

(12)

No. 83-712-CSY
Status: GRANTED

Title: New Jersey, Petitioner
v.
T.L.O.

Docketed:
October 7, 1983

Court: Supreme Court of New Jersey
Counsel for petitioner: Nides, Allan J.
Counsel for respondent: De Julio, Lois A.

Entry	Date	Note	Proceedings and Orders
1	Oct 7 1983	G	Petition for writ of certiorari filed.
2	Nov 7 1983	G	Motion of respondent for leave to proceed in forma pauperis filed.
3	Nov 7 1983		Brief of respondent T.L.O. in opposition filed.
4	Nov 9 1983		DISTRIBUTED. November 23, 1983
5	Nov 28 1983		Motion of respondent for leave to proceed in forma pauperis GRANTED.
6	Nov 28 1983		Petition GRANTED. *****
8	Jan 9 1984		Order extending time to file brief of petitioner on the merits until January 17, 1984.
9	Jan 12 1984	G	Motion of National School Boards Association for leave to file a brief as amicus curiae filed.
10	Jan 12 1984	G	Motion of Washington Legal Foundation for leave to file a brief as amicus curiae filed.
11	Jan 12 1984	G	Motion of New Jersey School Boards Association for leave to file a brief as amicus curiae filed.
12	Jan 16 1984		Brief of petitioner New Jersey filed.
13	Jan 16 1984		Joint appendix filed.
14	Jan 23 1984		Motion of National School Boards Association for leave to file a brief as amicus curiae GRANTED.
15	Jan 23 1984		Motion of Washington Legal Foundation for leave to file a brief as amicus curiae GRANTED.
16	Jan 23 1984		Motion of New Jersey School Boards Association for leave to file a brief as amicus curiae GRANTED.
17	Jan 30 1983		Leave to file respondent's brief on the merits in excess of the page limits filed with WJB (A-611).
18	Jan 30 1984		Record filed.
19	Jan 31 1984		Order granting leave to file respondent's brief on the merits not to exceed 65 pages by Justice Brennan.
21	Feb 9 1984		Brief of respondent T.L.O. filed.
22	Feb 14 1984		SET FOR ARGUMENT. Wednesday, March 28, 1984. (3rd case)
23	Feb 16 1984		Brief amicus curiae of ACLU, et al. filed.
24	Feb 27 1984		CIRCULATED.
25	Mar 21 1984	X	Reply brief of petitioner New Jersey filed.
26	Mar 28 1984		ARGUED.

1 pp

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FILED

OCT 7 1983

ALEXANDER C. STEVENS,
CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY,

Petitioner,

-vs-

T.L.O., a Juvenile,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY**

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QUESTION PRESENTED FOR REVIEW

Whether the Fourth Amendment's exclusionary rule applies to searches made by public school officials and teachers in school.

PARTIES TO THE PROCEEDING BELOW

In addition to the captioned parties, the parties in the New Jersey Supreme Court included Jeffrey Engerud, defendant now deceased, and, as *amicus curiae*, the New Jersey School Boards Association and the American Civil Liberties Union of New Jersey.

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

STATE OF NEW JERSEY,

Petitioner,

vs.

T.L.O., a Juvenile,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

OPINIONS BELOW

State in the Interest of T.L.O., 178 N.J. Super. 329, 428 A.2d 1327 (J.D.R.C. 1980), *aff'd o.b. in part and rev'd o.g. in part*, 185 N.J. Super. 279, 448 A.2d 493 (App. Div. 1982), *rev'd* 94 N.J. 331, 463 A.2d 934 (1983).

JURISDICTION

The judgment of the New Jersey Supreme Court which is the subject of this petition for *certiorari* was entered on August 8, 1983, and this petition has been filed within sixty (60) days of that date pursuant to *Rule 20(1)*, Rules of the Supreme Court. The jurisdiction of this Court is invoked pursuant to the provisions of *Title 28, United States Code, Section 1257(3)*.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and No Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

N.J.S.A. 24:21-19. Prohibited Acts

A. Manufacturing, distributing, dispensing - Penalties
a. Except as authorized by this act, it shall be unlawful for any person knowingly or intentionally:

(1) To manufacture, distribute, or dispense, or to possess or have under his control with intent to manufacture, distribute, or dispense a controlled dangerous substance;

N.J.S.A. 24:21-20. Prohibited Acts

B. Possession, use or being under influence - Penalties
a. It is unlawful for any person, knowingly or intentionally, to obtain, or to possess, actually or constructively, a controlled dangerous substance unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this act. Any person who violates this section with respect to: ...

(4) Possession of more than 25 grams of marijuana, including any adulterants or dilutants, or more than 5 grams of hashish is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 5 years, a fine of not more than \$15,000.00 or both; provided, however, that any person who violates this section with respect to 25 grams or less of marijuana, including any adulterants or dilutants, or 5 grams or less of hashish is a disorderly person.

STATEMENT OF THE CASE

On the morning of March 7, 1980, a teacher of mathematics at Piscataway High School entered the girls' restroom and found the juvenile-respondent T.L.O. and a girl named Johnson holding what the teacher perceived to be lit cigarettes. (MT20-1 to 25).¹ Smoking was not permitted and the girls were thus committing an infraction of the school rules. The girls were taken to the principal's office where they met with Theodore Choplick, the assistant vice-principal. (MT21-1 to 3; MT21-24 to 22-11; MT31-18 to 20; MT33-20 to 34-10).

Mr. Choplick asked the two girls whether they indeed were smoking. Miss Johnson acknowledged that she had been smoking and Mr. Choplick imposed three days' attendance at a smoking clinic as punishment. (T49-24 to 50-7). T.L.O. not only denied smoking in the lavatory, but further asserted that she did not smoke at all. (MT27-10 to 17). Rather than merely hand out punishment in the face of T.L.O.'s denial, Mr. Choplick asked T.L.O. to come into a private office. (MT27-14 to 21; MT30-22 to 31-17).

Once inside this office, Mr. Choplick requested the juvenile's purse and she gave it to him. (MT27-24 to 28-7). A package of Marlboro cigarettes was visible inside the purse. (MT28-9 to 11). Mr. Choplick held up the Marlboros and said to the juvenile, "You lied to me." (MT28-14 to 18). In plain view next to the Marlboros was a package of "Easy Roll" rolling papers for cigarettes. (MT28-19 to 24; T16-12 to 14). The juvenile was confronted with the rolling papers and denied that they belonged to her. (MT29-5 to 24).

On the basis of his experience, Mr. Choplick understood possession of rolling papers to indicate that a person is smoking marijuana. (MT29-7 to 9; T15-18 to 16-1). Therefore, Mr. Choplick looked further into the purse and found other drug paraphernalia and documentation of T.L.O.'s sale of marijuana to other students. Mr. Choplick called T.L.O.'s mother and then notified the police. (MT41-5 to 13).

T.L.O.'s mother acceded to a police request to bring her daughter to police headquarters for questioning. (T18-12 to 18). Once at headquarters, T.L.O. was advised of her rights in her mother's presence and signed a *Miranda* rights card so indicating. (T20-3 to 21). The

¹ "MT" refers to the transcript of the motion to suppress evidence heard on September 26, 1980;

"T" refers to the transcript of trial on March 23, 1981, the transcript of the juvenile's plea of guilty to other complaints on June 2, 1981, and the transcript of sentencing on January 8, 1982, all contained in one volume.

officer then began to question T.L.O. in her mother's presence. (T23-4 to 6). T.L.O. admitted that the objects found in her purse belonged to her. She further admitted that she was selling marijuana in school, receiving \$1 per "joint", or rolled marijuana cigarette. T.L.O. stated that she sold between 18 to 20 joints at school that very morning, before the drug was confiscated by the assistant vice-principal. (T22-2 to 15). A delinquency complaint charging the juvenile with possession of marijuana with the intent to distribute, contrary to N.J.S.A. 24:21-19(a)(1) and N.J.S.A. 24:21-20(a)(4), was then drafted and filed the same day. Because the offense occurred on school property, the school, in accordance with its published procedures, administratively suspended the juvenile for ten days.

On September 26, 1980, the State trial court considered and denied the juvenile's motion to suppress evidence. See *State in the Interest of T.L.O.*, 178 N.J. Super. 329, 428 A.2d 1327, 1343-1345 (J.D.R.C. 1980), *aff'd o.b. in part and rev'd o.g. in part* 185 N.J. Super. 279, 448 A.2d 493 (App. Div. 1982). On March 23, 1981, the juvenile was tried and, at the conclusion of trial, she was found guilty and adjudicated delinquent. (T69-6 to 8). On January 8, 1982, T.L.O. was sentenced to probation for one year with the special condition that she observe a reasonable curfew, attend school regularly and successfully complete a counselling and drug therapy program.

On February 11, 1982, the juvenile filed a Notice of Appeal to the Superior Court of New Jersey, Appellate Division. On June 30, 1982, the Appellate Division, with one judge dissenting, affirmed the denial of the motion to suppress evidence seized in the search of the juvenile's purse, for the reasons expressed in the trial court's reported opinion. *State in the Interest of T.L.O.*, 185 N.J. Super. 279, 448 A.2d 493 (App. Div. 1982).

On July 16, 1982, the juvenile filed a Notice of Appeal as of right to the Supreme Court of New Jersey. On August 18, 1983, the State Supreme Court held that the Fourth Amendment exclusionary rule applies to searches and seizures of students in public schools. *State in the Interest of T.L.O.*, 94 N.J. 331, 463 A.2d 934 (1983).

In that same opinion, the New Jersey Supreme Court decided the companion case of *State v. Engerud*, involving a search of a high school student's locker pursuant to information that the student was selling controlled dangerous substances in the school. Shortly after the date of the decision, the defendant Engerud was killed in a motorcycle accident, thus mooted any petition in that case.

SUMMARY OF ARGUMENT

The exclusionary rule should not be applied to a search of a student by a public school official. Because a school official is not primarily interested in whether a conviction is later obtained and conducts searches too infrequently to adapt his methods to the proper rules, application of the exclusionary rule would be an ineffective deterrent of those officials conducting unreasonable school searches. Any incremental deterrent effect of suppression in a later criminal proceeding would be far outweighed by the costs to society of suppression of probative evidence of criminality.

REASONS FOR GRANTING THE WRIT

POINT I

THE EXCLUSIONARY RULE IS INAPPLICABLE TO SEARCHES CONDUCTED BY PUBLIC SCHOOL OFFICIALS IN SCHOOLS.

In the present case,² the New Jersey Supreme Court ruled that a search of a public high school student's person or belongings by a school teacher or administrator constitutes an "official search" for Fourth Amendment purposes. Thus, the court ruled that the holdings of this Court require that any evidence seized pursuant to an unreasonable school search be excluded from evidence in any criminal or juvenile delinquency proceeding.³

This Court has never ruled that the Federal Constitution requires the exclusion of evidence seized pursuant to a school search performed solely by school officials devoid of any police involvement. Indeed, this Court has noted that its Fourth Amendment exclusionary rule mandates have related exclusively to searches conducted by police officials. Moreover, this Court has ruled that the exclusionary rule clearly does not apply to searches conducted by private persons not connected with law enforcement. *Burdeau v. McDowell*, 256 U.S. 465 (1921). The State of New Jersey asserts that although school officials are employed by the public and may be considered as public officials for some purposes, they have no more connection with law enforcement than any other citizen. Therefore, we submit that this Court never intended the exclusionary rule to apply to criminal proceedings emanating from searches and seizures by school teachers and officials. The contrary holding of the New Jersey Supreme Court is clearly unsupported and erroneous.

² *State in the Interest of T.L.O.*, 94 N.J. 331, 463 A.2d 934 (1983).

³ In this regard, it is noted that in this portion of its opinion the New Jersey Supreme Court ruled entirely on the basis of this Court's decisions and mandates. Thus, it is clear that this Court's jurisdiction is properly invoked. *Michigan v. Long*, _____ U.S. _____, 103 S.Ct. 3969, 3974-3975 (1983). The state court did refer to the fact that a state statute buttressed its conclusion that it was required to exclude evidence in a situation such as this. 94 N.J. at 342 n.5. The authority cited, however, refers only to the fact that the exclusionary rule applies equally to juvenile delinquency and adult criminal proceedings. The State of New Jersey did not contest this issue in the state courts and does not raise this issue in this Court. While agreeing that under New Jersey law the same types of illegally seized evidence would be excluded in both juvenile delinquency and adult criminal proceedings, we challenge the state court's finding that, on the basis of federal authority, evidence seized in a public school search is subject to the exclusionary rule as enunciated in *Mapp v. Ohio*, 367 U.S. 643 (1961).

The primary, if not the sole, justification for the exclusionary rule is the deterrence of illegal police conduct that violates Fourth Amendment rights.⁴ *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Janis*, 428 U.S. 433, 446 (1976); *United States v. Calandra*, 414 U.S. 338, 347-348 (1974). In recent years, this Court has refused to apply the rule to situations where it would achieve little or no deterrence, and has articulated a balancing test for the rule's application.

The exclusionary rule is justified in the illegal search context only because of its expected deterrence of future police misconduct. In determining whether to apply the rule, the benefits of deterrence are to be weighed against the substantial detriment to society and the truth-finding process inherent in excluding relevant evidence of criminality. *United States v. Calandra*, 414 U.S. at 347; see *United States v. Ceccolini*, 435 U.S. 268 (1978). Evidence should be excluded only where the benefit accruing to society from the additional deterrent to unlawful police practices equals or exceeds the detriment to society caused by the release of criminals. This Court has refused to rule "that anything which deters illegal searches is thereby commanded by the Fourth Amendment." *Alderman v. United States*, 394 U.S. 165, 174-175 (1969). The exclusionary rule is simply not coextensive with the Fourth Amendment. See *United States v. Havens*, 446 U.S. 620 (1980) (defendant may be impeached by evidence illegally obtained); *Michigan v. DeFillippo*, 443 U.S. 31 (1979) (that the statute pursuant to which defendant was arrested was later declared unconstitutional did not require suppression of evidence seized incident to that arrest); *United States v. Caceres*, 440 U.S. 741 (1979) (violation of IRS regulations regarding electronic surveillance does not require suppression of tape recordings in the prosecution of a taxpayer for bribery of an IRS agent); *United States v. Janis*, 428 U.S. 433 (1976) (additional marginal deterrence provided by forbidding use in federal civil proceeding of evidence illegally seized by state officials does not outweigh cost to society of applying rule in that situation); *United States v. Peltier*, 422 U.S. 531 (1975) (no suppression remedy for good faith border search occurring prior to Supreme Court decision holding that such searches must be based on probable cause); *United States v. Calandra*, 414 U.S. 338 (1974).

⁴ The second asserted justification, that of the "imperative of judicial integrity," although mentioned (see *United States v. Peltier*, 422 U.S. 531, 536-538 (1975); and *Elkins v. United States*, 364 U.S. 206, 222 (1969)), has been substantially, if not completely, discounted in importance as a basis for suppressing probative evidence. See *Stone v. Powell*, 428 U.S. at 485.

(exclusionary rule is inapplicable to grand jury proceedings because the speculative and undoubtedly minimal advance in the deterrence of police misconduct would be achieved at the expense of substantially impeding the role of the grand jury); *Alderman v. United States*, 394 U.S. 165 (1969) (additional benefits of extending the exclusionary rule to persons aggrieved by introductions of evidence unlawfully obtained in violation of another's privacy rights does not justify "further encroachment upon the public interest"); *Walder v. United States*, 347 U.S. 62 (1954) (the exclusionary rule is inapplicable to evidence used to impeach the defendant).

In balancing the expected deterrence benefits of applying the exclusionary rule against the expected detriments, in the context of a search by a public school official, it is clear that the balance weighs heavily against excluding evidence. Indeed, it has been argued that exclusion can be an effective deterrent only if two conditions are met: (1) the searcher must have a strong interest in obtaining convictions, and (2) the searcher must conduct searches and seizures regularly in order to be familiar enough with the rules to adapt his methods to conform to them. Note, 19 *Stan. L. Rev.* 608, 614-615 (1967). Neither condition can be met in the case of a public school official. The assistant vice-principal in this case had no interest in obtaining a criminal conviction. Indeed, the object of his search was evidence of a school disciplinary infraction wholly unrelated to any criminal prosecution. The possibility of suppression in a subsequent criminal judicial proceeding, had it occurred to the assistant vice-principal, would not have deterred him from enforcing the school's rules, his primary concern.

In this regard, the incentive of school officials to search could not be lessened by the suppression of evidence at a subsequent delinquency proceeding. Substantial incentives for school officials to search are provided by the need to enforce school regulations, to safeguard students during school hours by confiscating weapons and other contraband and to maintain a drug-free learning environment. Under the circumstances of this case, the vice-principal would undoubtedly have followed the same course of conduct in his attempt to enforce the school's non-smoking regulations regardless of his consideration, or knowledge, that any "evidence" seized would not be used later in a court of law.

Further, school authorities conduct searches infrequently and even less frequently come in contact with the criminal justice system. They have little interest in obtaining convictions, and are unlikely to even learn whether a court deems a particular search valid. Thus, there

is no reasonable possibility that a school official will become familiar with the law governing searches and seizures and be able to conform his conduct accordingly. The facts of this case demonstrate this principle quite plainly. A layman considering the juvenile's ready compliance with the request to hand over her purse might well conclude that she consented to the search. Clearly though, under *State v. Johnson*, 68 N.J. 349, 346 A.2d 66 (1975), which requires that a person be specifically informed of his right to refuse permission to search, the consent was not valid. It is unreasonable to request principals, teachers and others not involved in law enforcement to understand, and be able to apply to myriad factual situations, complex principles of law which give lawyers and judges pause.

Thus, it can be seen that application of the exclusionary rule to this type of case would be costly and ineffective. The suppression of evidence impedes the search for truth and frustrates achievement of that goal. The cost, both to society and to the juvenile, is high. Balanced against these costs, there is little or no benefit. The primary value of the exclusionary rule, deterrence, is not present, for school officials acting in the course of their employment have little or no interest in criminal proceedings and are not likely to know whether or why evidence they have discovered has been suppressed. Thus, application of the exclusionary rule to searches by school authorities without law enforcement involvement is senseless. Indeed, it is clear beyond doubt that when this Court developed the exclusionary rule, it did not intend to regulate the conduct of school officials who deal primarily with minor school disciplinary problems and infractions of school rules. Rather, it intended the rule to deter misconduct on the part of those persons who are charged with the regular enforcement of the criminal laws.

Despite the fact that this Court has never, even inferentially, applied the exclusionary rule to searches by school officials, the issue presented in this case has divided the state courts. A decision by this Court is needed in order to end the confusion in this area.

While adopting varying rationales, many state courts have ruled that the purpose of the Fourth Amendment exclusionary rule -- "discouraging lawless police conduct"⁵ -- would not be furthered by application of the rule to school searches. Therefore, these states have permitted evidence seized by school officials to be admitted into evidence at criminal proceedings without regard to the constitutionality of the search. See *D.R.C. v. State*, 646 P.2d 252, 258 (Alas. Ct. App. 1982); *In re G.*, 11 Cal. App.3d 1193, 90 Cal. Rptr. 361

⁵ *Terry v. Ohio*, 392 U.S. 1, 12 (1968).

(Ct. App. 1970); *In re Donaldson*, 269 Cal. App.2d 509, 75 Cal. Rptr. 220 (Ct. App. 1969); *State v. Young*, 234 Ga. 488, 216 S.E. 2d 586 (1975); *People v. Stewart*, 63 Misc.2d 601, 313 N.Y.S.2d 253 (Crim. Ct. N.Y. 1970); *State v. Wingerd*, 40 Ohio App.2d 235, 318 N.E.2d 866 (Ct. App. 1974); *Commonwealth v. Dingfeli*, 227 Pa. Super. 380, 323 A.2d 145 (Super. Ct. 1974); *Mercer v. State*, 450 S.W.2d 715 (Tex. Ct. App. 1970). See also *Keene v. Rogers*, 316 F.Supp. 217 (N.D. Me. 1970); *United States v. Coles*, 302 F.Supp. 99 (N.D. Me. 1969).

It must be noted, however, that other jurisdictions have ruled that even when acting alone, without any law enforcement involvement, public school officials are government agents for purposes of the exclusionary rule. In these jurisdictions, as in New Jersey following the State Supreme Court ruling in the present case, evidence obtained in a search conducted by school officials which does not strictly comply with the strictures of the Fourth Amendment will be suppressed at a criminal trial. See *State v. Baccino*, 282 A.2d 869 (Del. 1971); *State v. Mora*, 307 So.2d 317 (La. 1975), vacated and remanded sub nom. *Louisiana v. Mora*, 423 U.S. 809 (1976), aff'd on remand 330 So.2d 900 (La. 1976), cert. den. 429 U.S. 1004 (1976); *Doe v. State*, 540 P.2d 827 (N.M. 1975); *State v. Walker*, 528 P.2d 113 (Or. Ct. App. 1974). Cf. *Jones v. Latexo Indep. School Dist.*, 449 F.Supp. 223 (E.D. Tex. 1980).

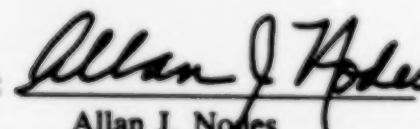
The important and recurring nature of the issue presented in this case is demonstrated by the chronology of *Louisiana v. Mora*, supra. In that case, the Supreme Court of Louisiana suppressed evidence obtained in a school search. This Court granted the State's petition for *certiorari* but remanded the case for consideration of whether the state judgment was based on state or federal grounds. The Supreme Court of Louisiana ruled, in a split decision, that it had ruled on the basis of both state and federal grounds, thus depriving this Court of jurisdiction. The State's reapplication for *certiorari* was denied. Although this Court was deprived of jurisdiction in *Louisiana v. Mora*, the issue presented in that case continues to reach disparate results. Compare *Jones v. Latexo Indep. School Dist.*, supra, and *State in the Interest of T.L.O.*, supra, with *Bellnier v. Lund*, 438 F.Supp. 47 (N.D.N.Y. 1977), and *D.R.C. v. State*, supra. Thus, this case presents an issue which has not been but should be decided by this Court. In addition, the decision of the New Jersey Supreme Court is in conflict with decisions of the courts of other states. Therefore, this Court should grant *certiorari* pursuant to *Supreme Court Rule 17(a) and (b)*.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the petition for a Writ of *Certiorari* should be granted.

Respectfully submitted,

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Dated: October 7, 1983

APPENDIX

APPENDIX A

OPINION OF THE SUPREME COURT OF
NEW JERSEY DECIDED AUGUST 8, 1983

STATE IN THE INTEREST OF T.L.O.,
JUVENILE-APPELLANT.

STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT, v.
JEFFREY ENGERUD, DEFENDANT-APPELLANT.

Argued May 10, 1983--Decided August 8, 1983.

Lois DeJulio, First Assistant Deputy Public Defender, argued the cause for appellant T.L.O. (*Joseph H. Rodriguez*, Public Defender, attorney).

Randolph A. Newman, Designated Counsel, argued the cause for appellant Jeffrey Engerud (*Joseph H. Rodriguez*, Public Defender, attorney).

Victoria Curtis Bramson, Deputy Attorney General, argued the cause for respondent State of New Jersey (*State in the Interest of T.L.O.*) (*Irwin I. Kimmelman*, Attorney General of New Jersey, attorney; *Victoria Curtis Bramson* and *Mark Paul Cronin*, Deputy Attorney General, of counsel and on the brief).

Rocky L. Peterson, Deputy Attorney General, argued the cause for respondent (*State v. Engerud*) (*Irwin I. Kimmelman*, Attorney General of New Jersey, attorney).

Paula A. Mullaly, General Counsel, submitted a brief on behalf of *amicus curiae* New Jersey School Boards Association (*State in the Interest of T.L.O.*) (*Paula A. Mullaly*, attorney; *Anthony P. Sciarrillo*, on the brief).

Barry S. Goodman submitted a brief on behalf of *amicus curiae* American Civil Liberties Union of New Jersey (*State in the Interest of T.L.O.*) (*Crummy, Del Deo, Dolan & Purcell* attorneys).

The opinion of the Court was delivered by
O'HERN, J.

The issues here are (1) whether the Fourth Amendment exclusionary rule applies to student searches made by public school

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administrators; and (2) what standard determines the reasonableness of the search if the exclusionary rule does apply.

T.L.O.

On March 7, 1980, a teacher at Piscataway High School reported that fourteen year old T.L.O. and another student were smoking in the girls' restroom. School regulations forbade smoking in that area and the teacher took the students to the assistant principal's office. He asked the students whether they had been smoking. T.L.O.'s companion admitted smoking and the assistant principal assigned her to a three-day smoking clinic.

T.L.O. denied smoking in the lavatory or indeed smoking at all. The assistant principal asked T.L.O. to go with him into a private office. He closed the door and asked her to turn over her purse. At this time they were both seated at a desk, he behind and she in front. When he opened the purse on the desk, he saw a pack of Marlboros. He picked up the cigarettes and said "You lied to me." As he reached into the purse for the cigarettes, he saw rolling papers in plain view. That fact, his experience told him, meant that marijuana was probably involved. He therefore looked further into the purse and found a metal pipe of the kind used for smoking marijuana, empty plastic bags and one plastic bag containing a tobacco-like substance. His search also revealed an index card reading "People who owe me money," followed by a list of names and amounts of \$1.50 and \$1.00, and two letters, one from T.L.O. to another student and a return letter, both containing language clearly indicating drug dealing by T.L.O. The purse also contained \$40, most of it in one-dollar bills.

The assistant principal called T.L.O.'s mother and the police. A police officer asked the mother to bring T.L.O. to police headquarters for questioning. There, T.L.O. admitted selling marijuana to other students. She was charged with delinquency based on possession of marijuana with the intent to distribute. *N.J.S.A. 2A:4-44; 24:21-20(a)(4); 24:21-19(a)(1)*.¹

T.L.O. moved to suppress the evidence seized from her purse and her confession, claiming that the search tainted the confession. She also argued that she had not knowingly waived her right to remain

¹Since this drug offense occurred on school property, the school, in accordance with published procedures, administratively suspended the juvenile for ten days.

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silent. The Juvenile and Domestic Relations Court denied the motion to suppress. *178 N.J. Super. 329 (1980)*.² It found the Fourth Amendment exclusionary rule applicable to school searches, but found the standard applicable to such a search to be "a reasonable suspicion that a crime has been or is in the process of being committed, or reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies." *178 N.J. Super. at 341* (emphasis in original). It concluded that the assistant principal had justification for opening the purse, since he had reasonable cause to believe that smoking, a violation of school policy, had occurred. Once he had opened the purse, in the court's opinion, the contents were subject to the "plain view" doctrine. Having found the marijuana and paraphernalia, the assistant principal justifiably continued his search to determine the extent of that violation. *178 N.J. Super. at 343*.

On appeal, the Appellate Division affirmed the denial of the suppression motion on the basis of the Juvenile Court's opinion. *185 N.J. Super. 279 (1982)*. But it vacated the adjudication of delinquency and remanded for further proceedings to determine whether the juvenile had knowingly waived her constitutional rights before giving the confession. Judge Joelson dissented from that portion of the opinion that approved a standard lower than probable cause for school searches. He characterized this as "riding rough-shod over the rights of a juvenile in school." *185 N.J. Super. at 284 (Joelson J., dissenting)*. T.L.O. appealed to us of right on the basis on the dissent below. *R.2:2-1(a)(2)*.

ENGERUD

On January 29, 1980, a vice-principal at Somerville High School met with a Somerville police detective in the high school office. The detective had just received a telephone call from a person claiming to be the father of a student. The caller said that the defendant, an eighteen year old student at the school, was selling drugs in the school and if the police did not stop it, he would take matters into his own

²During the pendency of the delinquency proceeding, the juvenile, by her parents, challenged her suspension in Superior Court, Chancery Division. That court ordered the suspension quashed because the search that revealed the marijuana violated the Fourth and Fourteenth Amendments.

The Juvenile Court considered and denied the juvenile's motion to dismiss the delinquency complaint. It refused to give *res judicata* or collateral estoppel effect to the Chancery Division's suppression of evidence in appellant's challenge to her suspension. *178 N.J. Super. 329 at 343-45*. That issue is not before us.

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hands. Their conversation lasted five minutes and the detective left the building.

The vice-principal then relayed this information to the assistant principal and the principal. The principal had heard a "rumor" a year earlier that the defendant was selling drugs at the school. He and the assistant principal opened the defendant's locker through the use of a pass-key that could open any locker in the building even though the lockers are equipped with combination locks. The two men made a complete search of the locker and its contents. In the defendant's coat pocket they found two plastic bags containing packets of a white substance that turned out to be methamphetamine (speed). Each packet was marked with its weight in fractions of a gram. They also discovered a package of marijuana rolling paper.

The vice-principal called the police and defendant's parents and took the defendant out of class. The principal asked the defendant to empty his pockets. This disclosed a small quantity of marijuana and \$45 in cash.

Engerud was charged with unlawful possession of a controlled dangerous substance and unlawful possession of a controlled dangerous substance with intent to distribute. *N.J.S.A. 24:21-20(a)(1); 24:21-19(a)(1)*. On June 18, 1981, the Law Division Judge denied a motion to suppress the evidence obtained from the locker and pocket searches. In his view the search was "responsible and diligent under all of the circumstances."

On July 9, 1981, defendant pleaded guilty to the second count of the indictment and was sentenced to an indeterminate term at Yardville, not to exceed five years. His sentence was stayed pending appeal. We certify Engerud's appeal directly. *R. 2:12-1. 93 N.J. 308 (1983)*.

I.

"It can hardly be argued that ... students ... shed their constitutional rights ... at the schoolhouse gate." *Tinker v. Des Moines Ind. Community School Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731, 737 (1969). In *Tinker*, the Supreme Court recognized that wearing an armband in school for the purpose of expressing certain views is a type of symbolic act that is protected by the free speech clause of the First Amendment. *Id.* at 505, 89 S.Ct. at 735, 21 L.Ed.2d at 737. It found that wearing the armband in the

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circumstances of the case involved no actually or potentially disruptive conduct, *id.*, and that students' constitutional rights are protected unless their conduct "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *id.* at 513, 89 S.Ct. at 740, 21 L.Ed.2d at 741. *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), establishes that whenever students face loss of an important substantive right, they share with every person protected by the Constitution the right to procedural due process.

This long-standing³ recognition of students' legitimate entitlement to the minimum protections of the Constitution parallels the developing concern of the Court that the juvenile justice system reflect the fundamental fairness that our Constitution guarantees adult offenders. See *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). Young people and students are persons protected by the United States and New Jersey Constitutions. *E.g.*, *Island Trees Union Free School Dist. No. 26 Bd. of Educ. v. Pico*, _____ U.S. _____, _____, 102 S.Ct. 2799, 2807, 73 L.Ed.2d 435, 445-46 (1982); *Tinker*, 393 U.S. at 511, 89 S.Ct. at 739, 21 L.Ed.2d at 740; *Gault*, 387 U.S. at 13, 87 S.Ct. at 1436, 18 L.Ed.2d at 538. But compare *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) (Eighth Amendment does not bar moderate corporal punishment of students) with *N.J.S.A. 18A:6-1* (banning corporal punishment in New Jersey schools).

Some contend, however, that the exclusionary rule should not apply since the fundamental purpose of *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), is to deter law enforcement officials from violating constitutional rights. They suggest that the school official be viewed as a private person, indeed as one *in loco parentis*,⁴ whose relationship to the student does not invoke the same protections as a search by a law enforcement official. But "[t]he Four-

³In *Tinker*, Justice Fortas showed that the Court had for half a century unmistakably recognized the application of constitutional rights to students. 393 U.S. at 506, 89 S.Ct. at 736, 21 L.Ed.2d at 737 (citing, *inter alia*, *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Bartels v. Iowa*, 262 U.S. 404, 43 S.Ct. 628, 67 L.Ed. 1047 (1923); *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923)).

⁴Judges and commentators have not failed to detect the irony of this analogy. They suggest that parents infrequently search their children and turn the evidence over to police for prosecution. *E.g.*, *State in Interest of T.L.O.*, 185 N.J.Super.

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teenth Amendment [here incorporating the Fourth Amendment], as now applied to the States, protects the citizen against the State itself and all of its creatures--Boards of Education not excepted." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628, 1637(1943) (school may not compel flag salute over religious objection); *State in Interest of G.C.*, 121 N.J.Super. 108, 114 (J.D.R.C.1972). The "basic purpose of [the Fourth Amendment] is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *In re Martin*, 90 N.J. 295, 312 (1982) (Pashman, J.)(quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312, 98 S.Ct. 1816, 1820, 56 L.Ed.2d 305, 311 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 528, 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930, 935 (1967)).

It is of little comfort to one charged in a law enforcement proceeding whether the public official who illegally obtained the evidence was a municipal inspector, *See v. Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967); *Camara*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930; a firefighter, *Michigan v. Tyler*, 436 U.S. 499, 506, 98 S.Ct. 1942, 1948, 56 L.Ed.2d 486, 496 (1978); or school administrator or law enforcement official. We believe that the issue is settled by the decisions of the Supreme Court and we accept the proposition that if an official search violates constitutional rights, the evidence is not admissible in criminal proceedings.⁵

279, 282 (App. Div. 1982) (Joelson, J., dissenting); *Mercer v. State*, 450 S.W.2d 715, 721 (Tex.Civ.App.1970)(Hughes, J., dissenting); *State v. McKinnon*, 88 Wash.2d 75, 91, 558 P.2d 781, 790 (Wash.Sup.Ct.1977) (Rosellini, J., dissenting); Buss, "The Fourth Amendment and Searches of Students in Public Schools," 59 Iowa L.Rev. 739, 768 (1974); Trosch, Williams & DeVore, "Public School Searches and the Fourth Amendment," 5 J.L. & Educ. 41, 53 (1982); Comment, 5 Fla.St.U.L.Rev. 526, 531 (1977). Today, cases reject broad application of the concept. E.g., *Horton v. Goose Creek Ind. School Dist.*, 690 F.2d 470, 480 n. 18 (5th Cir.1982), cert. den., _____ U.S. _____, 103 S.Ct. 3536, 76 L.Ed.2d _____ (1983); *D.R.C. v. State*, 646 P.2d 252, 255 (Alaska Ct.App.1982).

⁵Our Code of Juvenile Justice buttresses this conclusion. It specifically provides: The right to be secure from unreasonable searches and seizures ... shall be applicable in cases arising under this act as in cases of persons charged with crime. [N.J.S.A.2A:4-60].

Juvenile proceedings are not criminal proceedings but for ease of discussion we shall refer to suppression of evidence in criminal proceedings when a juvenile is charged with an offense under N.J.S.A. 2A:4-44 that would be a criminal offense if committed by an adult.

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II.

A more difficult question is whether a school official may effect a search without a warrant. We start with this proposition:

The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions." [*Mincey v. Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290, 298-99 (1978)(quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576, 585 (1967))].

See also *State v. Bruzzese*, _____ N.J. _____, _____ (1983) (slip op. at 8-9); *State v. Patino*, 83 N.J. 1, 7 (1980).

Our Court has generally held that, except in certain carefully defined classes of cases, officials may not conduct administrative searches of private property without a warrant. *Martin*, 90 N.J. 295. One of the best recognized exceptions is for "pervasively regulated" businesses. *United States v. Biswell*, 406 U.S. 311, 315-16, 92 S.Ct. 1593, 1596, 32 L.Ed.2d 87, 92 (1972); *Martin*, 90 N.J. at 312; *State v. Dolce*, 178 N.J.Super. 275, 283 (App.Div. 1981). Although the school setting does not at first glance fit that general mode, "[w]ithin that matrix, we examine the statute[s] and conduct of the [school officials] in this case." See *State v. Williams*, 84 N.J. 217, 225 (1980).

The Legislature has specifically charged school officials to maintain order, safety and discipline. The statutes give them authority to prevent disorderly conduct by pupils, N.J.S.A. 18A:25-2, and students are required to submit to such authority, N.J.S.A. 18A:37-1. Specifically, school officials have power to suspend pupils for illegal possession or consumption of drugs or alcohol, N.J.S.A. 18A:37-2(j), for assaulting teachers, N.J.S.A. 18A:37-2.1, or for other good cause. See N.J.S.A. 18A:37-2, -4. Other statutes allow them to deal specifically with pupils who are under the influence of drugs or alcohol, N.J.S.A. 18A:40-4.1 (principal shall notify parent); N.J.S.A. 18A:35-4a (board of education shall establish policies and procedures for evaluating and treating alcohol users). Finally, N.J.S.A. 18A:6-1

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grants specific power to seize weapons or other dangerous items and to quell disturbances.

Taken together, these statutes yield the proposition that school officials, within the school setting, have the authority to conduct reasonable searches necessary to maintain safety, order and discipline within the schools. This holding comports with prevailing decisional law. Judge Frank Johnson has stated it thus in the context of a college dormitory search:

A student naturally has the right to be free of unreasonable search and seizures, and a tax-supported [school] may not compel a "waiver" of that right as a condition precedent to admission. The [school], on the other hand, has an "affirmative obligation" to promulgate and to enforce reasonable regulations designed to protect campus order and discipline and to promote an environment consistent with the educational process. The validity of the regulation authorizing search of dormitories thus does not depend on whether a student "waives" his right to Fourth Amendment protection or on whether he has "contracted" it away; rather, its validity is determined by whether the regulation is a reasonable exercise of the [school's] supervisory duty. In other words, if the regulation—or, in the absence of a regulation, the action of the [school] authorities—is necessary in aid of the basic responsibility of the institution regarding discipline and the maintenance of an "educational atmosphere," then it will be presumed facially reasonable despite the fact that it may infringe to some extent on the outer bounds of the Fourth Amendment rights of students. [*Moore v. Student Affairs Comm. of Troy State University*, 284 F.Supp. 725, 729 (M.D.Ala.1968)(footnotes omitted)].

We agree with that analysis and we too "reject as unsound the notion that ... [students] waive their Fourth Amendment rights." See *Williams*, 84 N.J. at 225 (per-vasively regulated licensee does not "waive" constitutional rights). As in so many areas of the law, we must consider competing claims. Here we must weigh the individual student's rights against the school's obligation to maintain order. Cf. *State v. Williams*, 93 N.J. 39 (1983) (free press

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and fair trial rights); *In re Hinds*, 90 N.J. 604 (1982)(free speech and orderly trial). We are satisfied that the legislative scheme for public education in New Jersey contemplates a narrow band of administrative searches to achieve educational purposes.

III.

Finally, we must articulate the standard that should guide the school official in the conduct of the search. We reiterate the proposition that "[t]he basic purpose of [the Fourth] Amendment, as recognized in countless decisions of [the Supreme] Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara*, 387 U.S. at 528, 87 S.Ct. at 1730, 18 L.Ed.2d at 935. Whenever warrantless searches are authorized by law, they "are themselves subject to the independent constitutional requirement of reasonableness." *In re Martin*, 90 N.J. at 314 n.9 (citing *Barlow's*, 436 U.S. at 312, 98 S.Ct. at 1820, 56 L.Ed.2d at 311).⁶

Courts have adhered to the probable cause standard when police have participated in the search. *Picha v. Wielgos*, 410 F.Supp. 1214 (N.D.Ill.1976); *Piazzola v. Watkins*, 316 F.Supp. 624 (M.D.Ala.1970), *aff'd*, 442 F.2d 284 (5th Cir.1971); *M.J. v. State*, 399 So.2d 996 (Fla.Dist.Ct.App.1981); *People v. Bowers*, 72 Misc.2d 800, 339 N.Y.S.2d 783 (N.Y.Crim.Ct.1973); *Annot.*, 49 A.L.R.3d 978, 987-89 (1973); see also *Waters v. United States*, 311 A.2d 835, 837-38 (D.C.Ct.App.1973). If it should occur that a police-initiated search employs school officials for law enforcement purposes, courts will have little difficulty in finding a subterfuge. *Piazzola*, 316 F.Supp. at 628.

But when police have not participated in the search, courts have generally phrased the standard in terms less stringent than probable cause. The Supreme Court of Washington has outlined the reasons for this view:

⁶For example:

It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of the school officials in permitting such a nude search was not only unlawful but outrageous under "settled indisputable principles of law." [*Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir.1980), *cert. den.*, 451 U.S. 1022, 101 S.Ct. 3015, 69 L.Ed.2d 395 (1981)].

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The high school principal is not a law enforcement officer. His job does not concern the discovery and prevention of crime. His duty as the chief administrator of the high school includes a primary duty of maintaining order and discipline in the school. In carrying out this duty, he should not be held to the same probable cause standard as law enforcement officers. Although a student's right to be free from intrusion is not to be lightly disregarded, for us to hold school officials to the standard of probable cause required of law enforcement officials would create an unreasonable burden upon these school officials. Maintaining discipline in schools oftentimes requires immediate action and cannot await the procurement of a search warrant based on probable cause. We hold that the search of a student's person is reasonable and does not violate his Fourth Amendment rights, if the school official has reasonable grounds to believe the search is necessary in the aid of maintaining school discipline and order. [*State v. McKinnon*, 88 Wash.2d 75, 81, 558 P.2d 781, 784 (1977).]

We are satisfied that when a school official has reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order, the school official has the right to conduct a reasonable search for such evidence.

⁷This standard is closely akin to that articulated in the much-cited case of *People v. Jackson*, 65 Misc.2d 909, 319 N.Y.S.2d 731 (N.Y.App. Term 1971), *aff'd*, 30 N.Y.2d 734, 333 N.Y.S.2d 167, 284 N.E.2d 153 (N.Y.Ct.App. 1972). That case sustained a student search in which the school official had "reasonable grounds for suspecting that something unlawful was being committed, or about to be committed." 65 Misc.2d at 914, 319 N.Y.S.2d at 736.

The majority of cases have adopted either the *Jackson* or *McKinnon* standard. E.g., *State v. Baccino*, 282 A.2d 869 (Del.Super.Ct. 1971); *State v. D.T.W.*, 425 So.2d 1383 (Fla.Dist.Ct.App. 1983); *People v. Ward*, 62 Mich. App. 46, 233 N.W.2d 180 (Mich.Ct.App. 1975); *State in Interest of G.C.*, 121 N.J.Super. 108 (J.D.R.C. 1972) ("reasonable suspicion"); *Tarter v. Raybuck*, 356 F.Supp. 625 (N.D. Ohio 1983)(dictum); *Stern v. New Haven Community Schools*, 529 F.Supp. 31 (E.D.Mich. 1981); *Bilbrey v. Brown*, 481 F.Supp. 26 (D.Or. 1979); *M. v. Ball-Chatham Community Unit School Dist. No. 5 Bd. of Educ.*, 429 F.Supp. 288 (S.D.Ill. 1977) ("reasonable cause to believe").

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In determining whether the school official has reasonable grounds, courts should consider "the child's age, history, and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay, and the probative value and reliability of the information used as a justification for the search." *McKinnon*, 88 Wash.2d at 81, 558 P.2d at 784; *accord Bellnier v. Lund*, 438 F.Supp. 47, 53 (N.D.N.Y. 1977); *State v. D.T.W.*, 425 So.2d 1383, 1387 (Fla.Dist.Ct.App. 1983); *Doe v. State*, 88 N.M. 347, 352, 540 P.2d 827, 832 (N.M.Ct.App. 1975); *People v. D.*, 34 N.Y.2d 483, 489, 358 N.Y.S.2d 403, 408, 315 N.E.2d 466, 470 (N.Y.Ct.App. 1974); *In Interest of L.L.*, 90 Wis.2d 585, 600, 280 N.W.2d 343, 351 (Wis.Ct.App. 1979). Cf. *Tinker*, 393 U.S. at 513, 89 S.Ct. at 740, 21 L.Ed.2d at 741 (school limit on constitutional right justified when action "materially disrupts classwork or involves substantial disorder or invasion of the rights of others"). We also believe that "as the intrusiveness of the search intensifies, the standard of Fourth Amendment 'reasonableness' approaches probable cause." *M.M. v. Anker*, 607 F.2d 588, 589 (2d Cir. 1979).

The standard we adopt will not, as the dissent suggests, abandon the schools to drug pushers and muggers. We could make the same arguments that it does about preserving order in a city subway or on its streets. Surely, law enforcement would be easier without the Constitution, but that is not the way that the Framers chose.

We believe that our approach represents the best way to vindicate each student's right to be free from unreasonable searches and to receive a thorough and efficient education. Teachers' hands will not be tied. Indeed, commentators have observed that teachers have a better vantage point than police for systematic observation of potentially criminal student activities and movements and thus can articulate the reasonable grounds for a search. *Trosch, Williams & DeVore, "Public School Searches and the Fourth Amendment," 11 J.L. & Educ. 41, 55-56 (1982)*. In the long run, respect for law is the most cherished civic virtue that schools can impart. On that score, we agree with Justice Jackson:

...Boards of Education....have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason

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for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes. [*Barnette*, 319 U.S. at 637, 63 S.Ct. at 1185, 87 L.Ed. at 1637].

IV.

Applying these principles to the cases, we conclude that both judgments must be reversed. In the case of T.L.O., the assistant principal did not have reasonable grounds to believe that the student was concealing in her purse evidence of criminal activity or evidence of activity that would seriously interfere with school discipline or order. A student has an expectation of privacy in the contents of her purse. Mere possession of cigarettes did not violate school rule or policy, since the school allowed smoking in designated areas. The contents of the handbag had no direct bearing on the infraction.

The assistant principal's desire, legal in itself, to gather evidence to impeach the student's credibility at a hearing on the disciplinary infraction does not validate the search. Moreover, there were not reasonable grounds to believe that the purse contained cigarettes, if they were the object of the search. No one had furnished information to that effect to the school official. He had, at best, a good hunch. No doubt good hunches would unearth much more evidence of crime on the persons of students and citizens as a whole. But more is required to sustain a search.

In addition, although not necessary to our decision, even conceding the reasonableness of the purse opening, we would be hard pressed to sustain the balance of the search. The sight of rolling papers might justify looking for drugs but not "wholesale rummaging or browsing through a person's papers in the unparticularized hope of uncovering evidence of a crime." *State v. Smith*, 113 N.J.Super. 120, 135 (App.Div.1971).

In the case of *Engerud*, we also find lacking the necessary factual predicate for a reasonable ground to believe that his locker contained evidence in accordance with the test described. The official action was based only upon an "anonymous tip." The United States Supreme Court in revision of the *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), three-pronged test of informant's reliability, has stressed that "[its] decisions applying the totality of circumstances analysis ... have consistently recognized the value of corroboration of details of an informant's tip by independent police

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work." *Illinois v. Gates*, _____ U.S. _____, _____, 103 S.Ct. 2317, 2334, 76 L.Ed.2d 527 (1983). See also *Florida v. Royer*, _____ U.S. _____, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (brief stop, but not search, of person fitting drug courier profile justified without more). In this case there was neither a reliable informer nor independent corroboration. See *People v. D.*, 34 N.Y.2d 483, 358 N.Y.S.2d 403, 315 N.E.2d 466 (vague information from "confidential sources" insufficient).

We are satisfied that in the context of this case the student had an expectation of privacy in the contents of his locker. "[T]he Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 351, 88 S.Ct. at 511, 19 L.Ed.2d at 582. For the four years of high school, the school locker is a home away from home. In it the student stores the kind of personal "effects" protected by the Fourth Amendment. A student is justified in believing that the master key to the locker will be employed either at his request or convenience. That a master key exists to gain access to a hotel room does not make it any less entitled to privacy. See *Stoner v. California*, 376 U.S. 483, 490, 84 S.Ct. 889, 893, 11 L.Ed.2d 856, 861 (1964); *United States v. Lyons*, 706 F.2d 321, 327-28 (D.C.Cir.1983). Had the school carried out a policy of regularly inspecting students' lockers, an expectation of privacy might not have arisen. Cf. *People v. Overton*, 20 N.Y.2d 360, 362, 283 N.Y.S.2d 22, 24, 229 N.E.2d 596, 598 (N.Y.Ct.App.1967), vacated, 393 U.S. 85, 89 S.Ct. 252, 21 L.Ed.2d 218 (1968), adhered to, 24 N.Y.2d 522, 301 N.Y.S.2d 479, 249 N.E.2d 366 (N.Y.Ct.App.1969) (vice-principal had occasionally inspected lockers).

We do not disparage the school officials' actions in these cases. They must often, as here, act on short notice based on the information that they possess. Such officials have immunity from damages for claims resulting from their good faith judgments. See *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). The issue here is not criticism of their actions but the adjudication of constitutional rights when students face juvenile or criminal charges.

V.

In conclusion, (1) the obligation of school officials to furnish a thorough and efficient education and the statutory grants of power to school officials to maintain discipline confer the authority to conduct warrantless administrative searches on school premises;

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(2) the Fourth Amendment protects students from unreasonable administrative searches and seizures;

(3) searches are reasonable in this context if school officials have reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order, and the search itself is reasonable in scope;

(4) evidence otherwise obtained as a result of a warrantless search is illegally obtained and is inadmissible in criminal proceedings against students.

Having found that evidence was obtained in these cases in violation of these principles, we reverse the judgments below and direct that the evidence be suppressed.

SCHREIBER, J., dissenting.

Rather than tying the hands of school administrators in their formidable struggle to return our schools to places of learning and development, I would permit them to take reasonable steps to enforce valid school regulations. We must not lose sight of the fact that school administrators have an obligation to all children to insure that they receive a quality education. In fulfilling this obligation to all students, school authorities frequently have a duty to invade an individual public school student's privacy to determine whether there have been infractions of, and to enforce, school regulations. Nonetheless, administrators do not have an unlimited right to make any intrusion they desire, for the students have a constitutional right "to be secure in their persons, houses, papers and effects against unreasonable searches and seizures" (emphasis supplied).

It is important to recognize what this case is *not*. The Court is not faced with police seeking to make a search or seizure that may lawfully be consummated only after a warrant has been obtained upon a showing of probable cause. Indeed, it should be noted that the police need not always satisfy the standard of probable cause. "When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause." *United States v. Place*, _____ U.S. _____, 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983). See *Illinois v. Lafayette*, _____ U.S. _____, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983) (probable cause is irrelevant for inventory search made when arrested person is to be

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incarcerated); *United States v. Villamonte-Marquez*, _____ U.S. _____, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983) (customs officials boarding vessel for routine inspection of documents held reasonable though no probable cause or suspicion); *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981) (temporary detention of occupants while search of premises pursuant to a warrant is conducted is justifiable if based on articulable suspicion not amounting to probable cause); *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976) (when made in accordance with standard procedure, not unreasonable for police to make inventory search without probable cause of automobile impounded for parking violations); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881, 95 S.Ct. 2574, 2580, 45 L.Ed.2d 607, 617 (1975) ("when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion"); *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 1884, 20 L.Ed.2d 889, 911 (1968) (stop and frisk permissible if police officer has an articulable suspicion "that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous....").

The public school environment justifies a standard other than probable cause in deciding whether a public school administrator's investigations transgress reasonableness. Many jurisdictions have required that a search or seizure involving a public school student be predicated upon a "reasonable suspicion." See, e.g., *State in the Interest of G.C.*, 121 N.J.Super. 108, 117 (Cry.Ct.1972); *People v. Jackson*, 65 Misc.2d 909, 914, 319 N.Y.S.2d 731, 736 (App.Term 1971) *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972); see also, e.g., *Doe v. State*, 88 N.M. 347, 352, 540 P.2d 827, 832 (Ct.App.1975) (reasonable suspicion or reasonable cause to believe). This criterion has the advantage of having been applied by the Supreme Court. See *United States v. Brignoni-Ponce*, 422 U.S. at 882, 95 S.Ct. at 2580, 45 L.Ed.2d at 617. I do not know whether it functionally differs from the majority's "reasonable grounds to believe." To the extent that it requires more than a well-grounded suspicion, I would reject it. I reach that conclusion because a more stringent standard is not suitable in the public school educational setting.

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Attendance at public school is compulsory. *N.J.S.A. 18A:38-25*. The State is thereby assembling large numbers of young people in schools and has a duty to protect students from being harmed by others and by themselves. The students have a right to pursue their academic endeavors without exposure to dangers or overwhelming distractions. In other words, school authorities have a duty to maintain "a proper educational environment." 3 *W. LaFave, Search and Seizure* § 10.11, at 458 (1978).

School administrators must have broad supervisory and disciplinary powers, particularly because protecting students from dangers posed by anti-social activities is directly related to the educational process.¹ This goal has been supported by the Department of Education, which in its *Final Report, supra n. 1*, at 59, states:

In order to achieve the goals of instructional programs, local boards must actively assist students and staff by assuring a safe atmosphere, free from danger and disruption and one which promotes a positive environment conducive to learning. Disruptive behavior constrains the learning process and lowers school morale at all levels. A discipline policy must hold students accountable and consequently apply remedial and preventive steps that will ensure the safety and promote the education of all pupils.

In this respect the words of Judge Keating of the New York Court of Appeals in *People v. Overton*, 20 *N.Y.2d* 360, 362, 229 *N.E.2d* 596, 597-98, 283 *N.Y.S.2d* 22, 24-25 (1967), vacated, 393 *U.S.* 85, 89 *S.Ct.* 252, 21 *L.Ed.2d* 218 (1968), adhered to on rehearing, 24 *N.Y.2d* 522, 249 *N.E.2d* 366, 301 *N.Y.S.2d* 479 (1969), bear repeating:

¹The extent and nature of the problems in our schools are well documented. In July 1982, the Division of Research, Planning and Evaluation of the Department of Education published its *Final Report* required by *N.J.S.A. 18A:4-29.1*, repealed and supplemented by *N.J.S.A. 18A:17-46*. Between July 1, 1979 and June 30, 1981, school districts reported 21,721 incidents of violence, vandalism, drug abuse or any combination of these three. *Final Report on the Statewide Assessment of Incidents of Violence, Vandalism and Drug Abuse in the Public Schools* 2,4,5 (July 1982) [hereinafter cited as *Final Report*]. This staggering total may well understate the actual figures due to under-reporting. *Id.* at 2.

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The school authorities have an obligation to maintain discipline over the students. It is recognized that, when large numbers of teenagers are gathered together in such an environment, their inexperience and lack of mature judgment can often create hazards to each other. Parents, who surrender their children to this type of environment, in order that they may continue developing both intellectually and socially, have a right to expect certain safeguards.

It is in the high school years particularly that parents are justifiably concerned that their children not become accustomed to antisocial behavior, such as the use of illegal drugs. The susceptibility to suggestion of students of high school age increases the danger. Thus, it is the affirmative obligation of the school authorities to investigate any charge that a student is using or possessing narcotics and to take appropriate steps, if the charge is substantiated.

In light of such policy considerations, the "reasonableness" of the searches in the cases before us must be measured against the nature and extent of the intrusions involved. I part company with the majority's opinion in its assessment of the reasonableness of the school officials' conduct in these cases under either a "reasonable grounds to believe" or "reasonable suspicion" standard. Regardless of the standard employed these minimal invasions of a student's privacy were a valid exercise of a school administrator's authority.

After paying lip service to the principle that school officials have the authority to conduct reasonable searches necessary to maintain safety, order and discipline within the schools, *ante* at 343, the majority evaluates the conduct of the school official as if he were a policeman. If the school authorities acted properly, it is implicitly conceded that use of that evidence in a subsequent juvenile delinquency or criminal proceeding would be lawful. Our conclusion in these two cases centers on the propriety of the actions of the school administrators. No claim is made that the school officials were acting in concert with or on behalf of the police.

T.L.O.

The issue in *T.L.O.* is whether the assistant principal acted reasonably in opening the student's purse. A teacher had reported

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that she saw T.L.O., a 14-year-old girl, smoking in the girls' lavatory. Smoking at that location was forbidden by school regulations. When the assistant principal questioned T.L.O. as to whether she had "been smoking in the bathroom," T.L.O. replied that she did not smoke. The assistant principal asked for her purse and opened it. There--right on top--was a package of Marlboro cigarettes. The immediate question is, was the opening of the purse "reasonable" under these circumstances.

No one questions the validity of the school regulations. Smoking not only involves fire hazards, but also threatens the health and comfort of others. *See N.J.S.A. 26:3D-18* (requiring public schools to display sign "indicating that smoking is prohibited in the building except in designated areas"); *N.J.S.A. 26:3D-9* (prohibiting, with exceptions, smoking in all health care facilities); *N.J.S.A. 26:3D-3* (prohibiting smoking "in every passenger elevator in every building other than a single family dwelling"). School officials undoubtedly had a right to enforce that regulation and, in doing so, to investigate infractions and identify the wrongdoer. T.L.O.'s response was not simply a denial of having smoked in the lavatory, but a claim that she did not smoke at all. Her credibility was at issue. Was the school teacher's visual observation correct? Was T.L.O.'s denial predicated on the claim that she did not smoke at all to be believed? By denying that she smoked at all, she made the truth of that assertion at least relevant, and perhaps dispositive, of the accuracy of the teacher's allegation. Was it reasonable simply to open the purse without searching or rummaging through it? There the cigarettes sat on top, plainly visible. The existence of the cigarettes under these circumstances was directly related to the assistant principal's investigation. Once the cigarettes were found he was assured that T.L.O. had not been truthful and had probably violated the school regulation. When balancing the intrusiveness of searches such as opening the purse to see the immediately visible contents, with the broad supervisory authority of the school administrator to enforce a policy prohibiting smoking, a policy grounded in safety and health, the assistant principal was not only warranted, but also might well have been derelict had he not acted as he did.

Once the cigarettes were removed, the drug paraphernalia were in plain view, as the trial court found. Thereafter the assistant principal was justified in continuing his search to determine the extent of that violation.

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Engerud

Joseph Abate, vice-principal of Somerville High School, had heard, six months to a year before the incident giving rise to this case, that Jeffrey Engerud, a student at the high school, had been dealing in illegal drugs. Thereafter on one or two other occasions he heard rumors to the same effect. Michael Crisci, principal of the high school, had also heard that Engerud was involved with drugs. On January 29, 1980 the police advised Mr. Abate that they had received a phone call from the father of a student charging Engerud with selling drugs at the high school and threatening to take matters into his own hands if the police did not stop it.

Mr. Abate, Mr. Crisci and Mr. Carpenter, an assistant principal, discussed the matter. Mr. Crisci decided that it was "reasonable" under these circumstances to search Engerud's locker to see if anything might be there. That belief being well-founded, the search should be sustained. In upholding a search of a student's locker in *People v. Overton*, the court commented:

Indeed, it is doubtful if a school would be properly discharging its duty of supervision over the students, if it failed to retain control over the lockers. Not only have the school authorities a right to inspect but this right becomes a duty when suspicion arises that something of an illegal nature may be secreted there. [20 N.Y.2d at 363, 229 N.E.2d at 598, 283 N.Y.S.2d at 25].

Furthermore, Mr. Crisci had a passkey that could open any locker, a fact of which the students were aware. The student's expectation of privacy in the locker must assuredly have been diminished. A student had the right to exclude other students, but not school authorities who might reasonably be expected to inspect the locker upon reasonable belief or suspicion that contraband was hidden there.²

²The majority emphasizes a student's expectation of privacy in a locker by characterizing it as a "home away from home." *Ante* at 349. Needless to say, the record in this case does not support that assertion. It would be well for school authorities to dispel any such notion of privacy by notifying students that their lockers are subject to inspections by the school principal or vice-principal when he has a reasonable suspicion that a search is justifiable to insure compliance with school regulations. 3 W. LaFare, *Search and Seizure* § 10.11, at 463 & n. 54 (1978).

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Various rumors that came to the attention of the authorities at different times, coupled with the telephone call of an irate parent, certainly justified the school authorities in taking action.³ No matter what standard is applied--reasonable grounds to believe or a reasonable suspicion that Engerud was dealing in goods--the opening by the school principal of the locker, to which he had a key, cannot be said to have been an undue intrusion of Engerud's right of privacy in the locker.

As a matter of policy I would encourage school administrators to investigate violations of rules and regulations designed for the welfare of the student body. A similar position was expressed by the Sixth Essex County Grand Jury, investigating drug abuse among school age children in Essex County, which concluded:

We must face up to the fact that, because of its very nature, the school is the natural focal point for bad as well as good. Administrators must recognize that drugs are being used in their schools. Society must understand that the first step in eradicating the problem is to recognize its existence. *School officials who recognize the problem of drug abuse and implement steps to cure the problem must be applauded. Their efforts must be met with understanding and sympathy by the community they are serving. [Presentment of Sixth Essex County Grand Jury for the 1978 Term 21 (1979) (emphasis added)].*

Today this Court has substituted its judgment as to what constitutes reasonableness for the judgments of those who are charged with the responsibility for school discipline and supervision, as well as for those of the two trial judges. I would prefer to support public school administrators rather than frustrate their efforts to overcome what has become an overwhelming problem.

³The fact that the caller did not give his name does not negate a reasonable belief or suspicion in view of the several rumors that had come to the attention of the authorities. Cf. *Illinois v. Gates*, _____ U.S. _____, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527 (1983) (information from an anonymous informant is to be viewed in totality of circumstances to determine existence of probable cause). The majority's reliance upon *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and other cases relating to probable cause is misplaced. The majority by its own terms would require "reasonable grounds to believe," not probable cause, in public school searches. Evidential prerequisites for a reasonable belief or suspicion in a non-criminal matter differ from those necessary to infer probable cause in police enforcement.

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I would uphold both searches and affirm the judgments.
Justice GARIBALDI joins in this opinion.

For reversal--Chief Justice WILENTZ and Justices CLIFFORD, HANDLER, POLLOCK and O'HERN--5.

For affirmance--Justices SCHREIBER and GARIBALDI--2.

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OPINION OF THE SUPERIOR COURT OF
NEW JERSEY - APPELLATE DIVISION
DECIDED JUNE 30, 1982

STATE IN THE INTEREST OF T.L.O.,
JUVENILE-APPELLANT.

Superior Court of New Jersey
Appellate Division

Argued June 1, 1982--Decided June 30, 1982.

Before Judges MILMED, JOELSON and GAULKIN.

Lois DeJulio, First Assistant Deputy Public Defender, argued the cause for appellant T.L.O. (*Stanley C. Van Ness*, Public Defender, attorney).

Victoria Curtis Bramson, Deputy Attorney General, argued the cause for respondent State of New Jersey (*Irwin I. Kimmelman*, Attorney General, attorney; *Victoria Curtis Bramson* and *Mark Paul Cronin*, Deputy Attorney General, on the brief).

PER CURIAM.

We affirm the denial of the motion to suppress the evidence produced by the search of the juvenile's purse substantially for the reasons expressed by Judge Nicola in his opinion reported at 178 N.J. Super. 329 (J. & D.R.Ct.1980).

However, we find that neither the record nor the findings and conclusions of the trial judge are sufficient for us to determine the sufficiency of the *Miranda* waiver which was assertedly made by or on behalf of the juvenile immediately before her resumed questioning by the police officer. We must therefore remand the matter to the trial court for further proceedings and findings and conclusions in light of the principles enunciated in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) and *State v. Fussell*, 174 N.J. Super. 14 (App.Div.1980).

The final adjudication of delinquency entered on January 7, 1982 is vacated and the matter is remanded for further proceedings consistent herewith. We do not retain jurisdiction.

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JOELSON, J.A.D., dissenting in part.

The opinion of the trial judge, *State in Interest of T.L.O.*, 178 N.J. Super. 329 (J. & D.R.Ct.1980), acknowledges that "...public school officials are to be considered governmental officers, ..." *Id.* at 340. See also *Durgin v. Brown*, 37 N.J. 189, 199 (1962); *Kaveny v. Bd. of Com'rs of Montclair*, 69 N.J. Super. 94, 101-102 (Law Div. 1961), *aff'd* 71 N.J. Super. 244 (App.Div.1962); *State in the Interest of G. C.*, 121 N.J. Super. 108 (J. & D.R.Ct.1972). The trial court's opinion further recognizes that juveniles in public schools are not without constitutional rights. 178 N.J. Super. at 337. See also *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). However, although stating that public school students are entitled to Fourth Amendment rights, the trial court chose to follow those jurisdictions which apply a lower standard of reasonableness with regard to searches and seizures conducted by public school authorities against children in school.

The result arrived at by the trial court and approved by my colleagues in the majority would deny to a high school girl suspected of an infraction of a school regulation the same Fourth Amendment protection given to an out-of-school juvenile suspected of a violation of law, or even to an adult suspected of the most heinous crime. As anomalous as this might appear, it must be acknowledged that there is a special relationship between pupils and school authorities, and that the reasonableness of a search and seizure should be assessed in the context of that relationship. However, along with such an acknowledgment comes a need for the exercise of care lest the standard of reasonableness should be permitted to sink so low as to legitimize the search and seizures that took place in the case under review.

Although the trial judge in the opinion which has been adopted by my colleagues gave lip service to the Fourth Amendment, he applied the diminished standard of reasonableness in such a way as to render the protection of the Fourth Amendment virtually unavailable to juveniles in public schools who are suspected of violation of school regulations. As the trial judge noted, some jurisdictions flatly hold that the Fourth Amendment need not be applied in a school setting. 178 N.J. Super. at 339. However, the New Jersey Legislature has

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decreed otherwise in providing that juveniles shall be accorded "[t]he right to be secure from unreasonable searches and seizures." *N.J.S.A. 2A:4-60*. The Fourth Amendment protection of juveniles thus having been confirmed, courts should not effectively deny Fourth Amendment rights to school children while at the same time proclaiming that those rights exist.

The search we are dealing with was conducted in order to ascertain whether the juvenile had violated a school regulation by smoking a tobacco cigarette in an unpermitted location. The search revealed marijuana violations. The trial court in upholding the search relies on the concept of *in loco parentis*. *178 N.J. Super. at 338*. That concept, which is usually applied for the purpose of protecting a child, is being used here to strip the juvenile of constitutional protection. It would be rare parents indeed who would turn their daughters over to the police the first time they find her to possess or even distribute marijuana. It is unthinkable that a parent so finding could be successfully prosecuted for not reporting the information to the police, whereas a school authority would most likely not be accorded the same tolerance.

Nevertheless, as already stated, it must be recognized that the *sui generis* relationship between school authorities and pupils requires a different standard of reasonableness concerning search and seizure. For instance, if a teacher has been informed that a school child has matches in his pocket and has announced his intention to roast marshmallows in the clothes closet, an immediate search of the youngster following his denial of possessing matches would be not only justified but necessary. Common sense must be used on a case by case basis with due regard to the danger that might reasonably be suspected, the seriousness of the suspected misconduct, or the over-riding need to enforce discipline in a given situation. The trial court's opinion suggests guidelines applicable to a lowered standard of reasonableness, *178 N.J. Super. at 342*, but the record before us casts doubt about the validity of the search here even under the very guidelines suggested.

A fuller discussion of the facts of the case is now needed. According to the trial judge's factual review, a high school teacher observed

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T.L.O. and another girl smoking cigarettes in the girls' lavatory. The teacher immediately brought the girls to the vice-principal, and upon being asked whether she had been smoking, T.L.O. replied that she did not smoke at all. Thereupon, the vice-principal inspected her purse. His testimony was that as he reached into the pocketbook to remove a package of Marlboro cigarettes, he observed "rolling papers." He then looked further and found what appeared to be marijuana,¹ paraphernalia for smoking marijuana, and some empty plastic bags. He stated that he then went on to look at "all the compartments," and that in one of them he found index cards and letters between T.L.O. and another juvenile, which he read. They indicated drug distribution. He also opened a wallet containing \$40.98 found in the compartment. The police were immediately called, and they took T.L.O. to police headquarters.

The juvenile was suspected of smoking ordinary cigarettes. There is no indication whatever, nor has it been charged, that she smoked marijuana in school. The only thing that a search of the juvenile's purse could have disclosed as to tobacco cigarettes was whether or not she possessed them. Yet such possession would not have constituted an infraction of any rule or law. It appears from the opinion of the trial court that the regulation which the juvenile was suspected of violating was that of smoking in an area not designated for that purpose. There was no school regulation or policy which flatly prohibited students from possessing cigarettes or even from smoking them in permitted areas. *178 N.J. Super. at 341-342*. Nor can it be said that the search was necessary to gain information in order to avert the danger of fire attendant upon smoking in an unpermitted location. The vice-principal already had the direct account of the teacher who had personally witnessed the infraction by T.L.O. and another. Thus, the search was not conducted for the purpose of protection or for the maintenance of school discipline, but for the purpose of impeaching the credibility of the juvenile. Such a search is unreasonable even under a lowered standard, and its unreasonableness was exacerbated by its scope.

There is no doubt widespread frustration because of the exclusionary rule which bars from evidence material obtained through an improper search and seizure even though such search has obviously revealed the person searched to be guilty of having violated the criminal law.

¹The net weight of the marijuana was stipulated to be 5.40 grams.

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Such frustration is not difficult to understand, but the problem should not be addressed by our riding rough-shod over the rights of a juvenile in school, diminished though these rights may be.

I would reverse as to the denial of the motion to suppress the evidence obtained from the search and seizure.

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OPINION OF THE JUVENILE AND
DOMESTIC RELATIONS COURT -
MIDDLESEX COUNTY, NEW JERSEY,
DECIDED SEPTEMBER 26, 1980

STATE IN THE INTEREST OF T.L.O.

Juvenile and Domestic Relations Court
Middlesex County

September 26, 1980.

Frederick A. Simon for movant (*Rosenberg & Simon*, attorneys).
Kenneth J. Lebrato, Assistant Prosecutor, for the State of New
Jersey.

NICOLA, P.J.J. & D.R.

This written opinion is intended to supplement the oral opinion previously rendered by the court.

A complaint was filed in this court alleging that a 15-year-old juvenile possessed marijuana with the intent to distribute, in violation of *N.J.S.A. 24:21-20(a)(4)* and *24:21-19(a)(1)*. The juvenile, herein referred to as T.L.O., was accused of illegally possessing marijuana found in her purse. Evidence obtained through a search of the juvenile's purse by a school's vice-principal indicated that the juvenile had been selling marijuana to other students in school.

Prior to this hearing on the complaint the juvenile filed a motion in the Superior Court, Middlesex County, Chancery Division, to show cause why T.L.O. should not be reinstated in school, having been suspended for smoking cigarettes and possessing marijuana. Judge David Furman, J.S.C., heard the matter on March 31, 1980 and upheld the suspension for smoking cigarettes but vacated the suspension imposed for possession of marijuana. The court found that the suspension for possession of marijuana resulted from evidence obtained in a warrantless search of the juvenile's purse, in violation of the Fourth Amendment's guarantees against unreasonable searches and seizures.

Presently before the court for its consideration is a motion to dismiss the complaint and suppress the evidence. The juvenile argues

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that the complaint should be dismissed on the basis of *res judicata* and collateral estoppel stemming from the prior proceeding. Additionally, the juvenile argues that her due process rights were violated by an unlawful search and seizure conducted by the assistant vice-principal and seeks to have this evidence suppressed.

This complaint arises from an occurrence on March 7, 1980. A Piscataway High School teacher observed the juvenile and another girl smoking cigarettes while in the girls' lavatory. The teacher escorted the girls to the assistant vice-principal's office and accused them of violating the school's no-smoking restriction. When asked by the vice-principal whether she had, in fact, been smoking in the girls' room, T.L.O. replied that "she didn't smoke at all." With this conflicting response the vice-principal requested the student's purse and upon inspection found a package of cigarettes plainly visible. While removing the cigarettes, marijuana and marijuana paraphernalia became visible. Further inspection revealed \$40.98 in single dollar bills and change as well as a handwritten letter by T.L.O. to a friend asking her to sell marijuana in school.

The assistant vice-principal summoned the police and turned over the marijuana and paraphernalia to them. The juvenile's parents were also notified. In the presence of her mother at police headquarters, T.L.O. admitted to selling marijuana in school, after being advised of her rights. She stated that on the day in question, she had sold approximately 18 to 20 marijuana cigarettes for a price of one dollar each.

T.L.O. was suspended from school for three days for smoking cigarettes and seven days for possession of marijuana. As previously indicated, the juvenile obtained an order to show cause why she should not be reinstated in school. At the hearing on that matter the judge found that the search conducted by the vice-principal violated the Fourth Amendment guarantees. Any consent to the search of the purse by the juvenile was ruled ineffective due to a failure to advise her that she had a right to withhold such consent.

The juvenile now seeks to raise the findings of the civil proceeding as a bar to this matter through a motion to dismiss. She asserts the doctrines of *res judicata* and collateral estoppel. Additionally, the juvenile wishes to suppress the evidence by addressing the constitutionality of the search conducted by the vice-principal.

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This court will first address the constitutionality of the search and seizure; more specifically, the issue is whether or not a school official is subject to the Fourth Amendment and the standard of probable cause which must exist before said official may engage in a search of a student on school grounds in order to enforce a disciplinary rule.

The Fourth Amendment to the United States Constitution provides, "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated"

The Fourth Amendment does not prohibit all searches and seizures, but only unreasonable ones. The reasonableness of a search is determined by a balancing of the government's interests in conducting a search with the individual's right to be free from intrusion. See *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). Generally, police officials are required to obtain a search warrant based upon probable cause except for a few "jealously and carefully drawn" exceptions. *Collidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). To avoid circumvention of the probable cause requirement through warrantless searches the same standard of probable cause is imposed to justify a warrantless search. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). There have been instances, however, where the government's need to search has been held to outweigh the intrusion upon the person's privacy, and the Supreme Court has allowed a lower standard as justification for a constitutionally valid search. *Terry v. Ohio*, 392 U.S. 1, 88, S.Ct. 1868, 20 L.Ed.2d 889 (1968) (stop and frisk); *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (routine stops at permanent border checkpoints).

The Supreme Court, however, has long been vigilant in protecting the rights secured by the Fourth Amendment, as in evidenced by its adoption of the exclusionary rule. The exclusionary rule, as enunciated in *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), allows suppression of evidence seized in violation of the Fourth Amendment. Initially applied only in federal courts, *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) has since extended the rule to the states through the Fourteenth Amendment. However, the court has held that the Fourth

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Amendment's proscription only applies to unreasonable searches and seizures made by governmental officials. *Burdeau v. McDowell*, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921).

The vigilance of the Supreme Court is evidenced as well by its recognition of the constitutional rights and protections belonging to juveniles. *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) (procedural due process); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (requiring proof beyond a reasonable doubt).

The court has made it clear that juveniles, as students, do not lose their constitutional rights when they enter the school house. *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). *Tinker* involved an expression of the First Amendment rights by high school students. The students were suspended for wearing black arm bands to protest the hostilities of the Vietnam War. The court held that the students' actions constituted speech protected by the First Amendment to the Constitution, and that they therefore could not be suspended for expressing their views in a non-disruptive manner:

The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966). [*Tinker v. Des Moines School Dist.*, 393 U.S. at 512-13, 89 S.Ct. at 739-40; footnotes omitted]

Yet, the court specifically went on to limit the First Amendment rights given to students:

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But conduct by the student, in class or out of it, which for any reason--whether it stems from time, place, or type of behavior--materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. [Ibid.]

This limitation, intended to protect the classroom decorum, was also recognized in *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). Although *Tinker* and *Goss* did not deal with the Fourth Amendment rights of students, the same recognition of schoolroom decorum appears to be appropriate when dealing with Fourth Amendment rights. *State v. McKinnon*, 88 Wash.2d 75, 558 P.2d 781 (Sup. Ct. 1977).

Indeed, the rights of juveniles are not coextensive with the rights of adults, regardless of their student status. The Supreme Court has stated:

...[E]ven where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults... The well-being of its children is of course a subject within the state's constitutional power to regulate... [P]arents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of the laws designed to aid discharge of that responsibility." [*Ginsberg v. New York*, 390 U.S. 629, 638-639, 88 S.Ct. 1274, 1280, 20 L.Ed.2d 195]

A teacher's responsibility for and control over a student is derived from the concept of *in loco parentis*. It is stated as a general rule that the teacher stands in the place of the pupil's parents, and may exercise powers necessary to control, restrain and correct students within reason, to enable him to properly perform his duties and provide a proper education. 79 C.J.S., *Schools*, § 493. In New Jersey the concept is applied through statute requiring the student to recognize the authority of the teacher. The pertinent statute states:

Pupils in the public schools shall comply with the rules established in pursuance of law for the government of such schools, pursue the prescribed course of study and submit to the authority of the teachers and others in authority over them. [N.J.S.A. 18A:37-1]

See, also, N.J.S.A. 18A:37-2 to 5, 18A:25-2.

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A number of courts have already addressed the issue of searches of students in school by school officials. Their approaches to the applicability of the Fourth Amendment and exclusionary rule have varied and may be placed in the following categories:

(1) The Fourth Amendment does not apply because the school official acted *in loco parentis*, that is, he stands in the place of the parents; *In re G.*, 11 Cal.App.3d 1193, 90 Cal.Rptr. 361 (D.Ct.App.1970); *In re Donaldson*, 269 Cal.App.2d 509, 75 Cal.Rptr.220 (D.Ct.App.1969); *People v. Stuart*, 63 Misc.2d 601, 313 N.Y.S.2d 253 (1970); *Commonwealth v. Dingfelt*, 227 Pa.Super.380, 323 A.2d 145 (Super.Ct.1974); *Mercer v. State*, 450 S.W.2d 715 (Tex.Civ.App.1970);

(2) The Fourth Amendment applies, but the exclusionary rule does not; *Doe v. Renfrow*, 475 F.Supp.1012 (N.D.Ind.1979); *United States v. Coles*, 302 F.Supp.99 (D.Me.,N.D. 1969); *State v. Young*, 234 Ga. 488, 216 S.E.2d 586 (Sup.Ct.1975); *State v. Wingerd*, 40 Ohio App.2d 236, 318 N.E.2d 866 (Ct.App.1974);

(3) The Fourth Amendment applies but the doctrine of *in loco parentis* lowers the standard to be applied in determining the reasonableness of the search; *Bilbrey v. Brown*, 481 F.Supp.26 (D.C.Or.,1979); *In re W.*, 29 Cal.App.3d 777, 105 Cal.Rptr. 775 (D.Ct.App.1973); *In re C.*, 26 Cal.App.3d 320, 102 Cal.Rptr. 682 (D.Ct.App.1972); *State v. Baccino*, 282 A.2d 869 (Del.Super. 1971); *State v. F.W.E.*, 360 So.2d 148 (Fla.D.Ct.App.1978); *People v. Ward*, 62 Mich.App. 46, 233 N.W.2d 180 (App.Ct.1975); *In re G.C.*, 121 N.J.Super. 108, 296 A.2d 102 (J.Dr.Ct.1972); *Doe v. State*, 88 N.M. 347, 540 P.2d 827 (Sup.Ct.1975); *People v. Singletary*, 37 N.Y.2d 310, 372 N.Y.S.2d 68, 333 N.E.2d 369 (Ct.App.1975); *People v. D.*, 34 N.Y.2d 483, 358 N.Y.S.2d 403, 315 N.E.2d 466 (Ct.App.1974); *People v. Jackson*, 65 Misc.2d 909, 319 N.Y.S.2d 731 (App.Term, 1st Dept. 1971), *aff'd*, 30 N.Y.2d 734, 333 N.Y.S.2d 167, 284 N.E.2d 153 (Ct.App.1972); *State v. McKinnon*, 88 Wash.2d 75, 558 P.2d 781 (Sup.Ct.1977); *In re L.L.*, 90 Wis.2d 585, 280 N.W.2d 343 (Sup.Ct.1979);

(4) The Fourth Amendment applies and requires a finding of probable cause in order for the search to be reasonable; *Picha v. Wielgos*, 410 F.Supp. 1214 (W.D.Ill.1976); *State v. Mora*, 307 So.2d 317 (La. 1975), *vacated* 423 U.S. 809, 96 S.Ct. 20, 46 L.Ed.2d 29; 330 So.2d 900 (La. 1976).

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This court, in accordance with the New Jersey case of *In re G.C.*, decided by a court of comparable jurisdiction finds that public school officials are to be considered governmental officers, and therefore the approach taken by the preceeding catagory of cases, which holds the Fourth Amendment applicable to school searches but lowers the reasonableness standard as a result of the application of the *in loco parentis* doctrine, to be the most persuasive.

The court in the recent case of *In re L.L.*, in a review of the authorities of this issue, analyzed the interests involved which allowed the lower standard sufficient to satisfy the Fourth Amendment requirement of reasonableness. These interests may be summarized as: (1) the State's strong interests in providing an education in an "orderly atmosphere which is free from danger and disruption"; (2) the student's reasonable expectation of privacy while in school, which is lower than in other places because of the expected restraint exercised over students for security or discipline; (3) "the realities of the classroom present few less intrusive alternatives to an immediate search for suspected dangerous or illegal items or substances." 90 Wis.2d at 600-601, 280 N.W.2d at 350-51.

The Federal District Court in *Doe v. Renfrow* considered the factor of an absence of any normal or justifiable expectation of privacy on behalf of the students. The court stated that students cannot be said to enjoy any absolute expectation of privacy while in the classroom setting because of the constant interaction among students, faculty and school administrators. A reasonable right to inspection is necessary for the school's performance of its duty to protect all students and the educational process. The court went on to state:

There is no question as to the right, and indeed, the duty of school officials to maintain an educationally sound environment within the school. It is the responsibility of the school administrator to insure the proper functioning of the educational process ... Maintaining an educationally productive atmosphere within the school rests upon the school administration certain heavy responsibilities. One of these is that of providing an environment free from activities harmful to the educational function and to the individual student. [475 F.Supp. at 1020]

In accordance with the foregoing standards, the United States District Court, in *Bilbrey v. Brown*, 481 F.Supp. 26 (D.Or.1979),

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a case in which plaintiffs challenged the constitutionality of a school district's search and seizure policies as set forth in the district's "Minimum Standards for Student Conduct and Discipline," held that such searches may properly be conducted when a school official has reasonable cause to believe a student has violated school policy.

Therefore, this court finds that a school official may properly conduct a search of a student's person if the official has a reasonable suspicion that a crime has been or is in the process of being committed, or reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies.

The present case deals with a school standard of discipline and not criminal activity. The standard of reasonableness must be applied, whether we are dealing with noncriminal activity or a school standard of discipline. A reasonable standard is defined as one designed to protect the health, safety and welfare of the child involved, as well as the student population. School officials, therefore, have the right to deliberately restrict smoking to certain areas within the school. Such designations are not arbitrary, but rather based on the school official's experience and knowledge of fire codes and standards. When a school drafts its smoking regulations it considers the following factors: the structure of the building with respect to fire resistance (e.g., fire walls); the ability to control smoking in the area where it is permitted (e.g., by teacher supervision) in order to insure that the privilege is not abused and to reduce the threat of hostile fires; the availability of fire escapes. A further consideration, of increasing importance, is the right of the nonsmoking student to be free from exposure to the detrimental effects of cigarette smoke. Certainly the potential harm and detrimental effect that can be caused by the abuse of smoking privileges are as serious as those which may result from criminal activity committed within the schools. School officials, therefore, must have the same rights to investigate and control the abuse of noncriminal activities as they do in instances involving weapons and drugs. Thus, this court finds that the school's nonsmoking regulation has satisfied the reasonableness standard.

While accepting a lower standard in determining the reasonableness of a search, this court is aware of the other factors which the courts have stated would be considered in determining the sufficiency of cause to search. The factors to be judged are: (1) the child's age, history and school record; (2) the prevalence and seriousness of the problem in the school to which the search was directed;

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(3) the exigency of the situation requiring an immediate warrantless search; (4) the probative value and reliability of the information used as a justification for the search; (5) the teacher's prior experience with the student. *In re L.L.*, *State v. McKinnon*, *Bellnier v. Lund*, *Doe v. State* all *supra*. These factors should serve as a guideline in determining whether some reasonable suspicion of a crime or violation of school regulation has occurred.

Applying the foregoing to the facts of this case, it is apparent that the vice-principal had a right to conduct a search of the student. A teacher had observed the student smoking in an area where such was prohibited. Although the student denied smoking, the school official had a duty to investigate and determine whether a violation of the school's code had occurred. The nature of this situation dictated the actions taken by the vice-principal.

Although the vice-principal was justified in opening the purse, an exploratory search was not permissible. His limited purpose was to determine whether the violation, which was reasonably suspected, had, in fact, occurred. However, once the purse was open, the contents were subject to the "plain view" doctrine--an exception to the warrant requirement. Under the plain view doctrine a law enforcement officer may seize any object that is in his plain view if he has a right to be in the position to have that view. *Harris v. United States*, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968); *State v. McKnight*, 52 N.J. 35 (1968). Upon finding the marijuana and paraphernalia, the vice-principal was justified in continuing his search to determine the extent of that violation.

Concerning the juvenile's motion to dismiss, the issue raised is whether the present criminal proceeding in Juvenile and Domestic Relations Court is barred by the former hearing at which the juvenile sought reinstatement in school. As stated, the juvenile contends that the complaint should be dismissed on the basis of *res judicata* and collateral estoppel. The State argues that those doctrines which have been incorporated into the criminal law through the Double Jeopardy Clause, are inapplicable and do not bar the present proceeding.

In *State v. Redinger*, 64 N.J. 41 (1973), our Supreme Court stated:

"Collateral estoppel has been described as an awkward phrase. Essentially, it means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same

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parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970). In *Ashe*, the Supreme Court held that collateral estoppel as applied in the Federal decisions must be considered a part of the Fifth Amendment's guaranty against double jeopardy and binding on the States through the 14th Amendment under *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). [at 45-46]

The applicability of collateral estoppel to the present case appears to hinge upon the question of sufficiency of identity of the parties in the two proceedings. A similar situation was considered in *Kugler v. Banner Pontiac-Buick, Opel, Inc.*, 120 N.J. Super. 572 (Ch.Div.1972). In that case the Attorney General filed a complaint against the defendant for a consumer fraud violation, seeking relief under the applicable statute. An order to show cause was issued under the Consumer Fraud Act. At the return hearing on the order to show cause defendant moved to discharge the order based on the doctrines of *res judicata* and collateral estoppel. Prior to the filing of the complaint defendant had appeared in the municipal court on a violation of a similar statute. In that proceeding defendant was acquitted upon the same operative facts. As a result, the court in the second proceeding was confronted with the issue of whether collateral estoppel would apply to the action taken by the Attorney General.

That court considered the identity of the parties a requisite to the application of that doctrine and stated: "Certainly it could not have been intended that a proceeding in the name of the State by a local prosecutor would forever collaterally stop the Attorney General in an *ex. rel.* action or as legal advisor and attorney to an administrative agency." 120 N.J. Super. at 580. As a result, the court denied defendant's motion to dismiss on the grounds of *res judicata* and collateral estoppel.

In the present case the juvenile argues that the parties involved in the prior proceeding are identical in interest with those in the present hearing. She argues that although the State of New Jersey was not named in the prior proceeding concerning the student's reinstatement, the Piscataway Board of Education stood in precisely the same position as the State does in this hearing. However, this court finds, in accordance with the reasoning of the court in *Kugler*, that the State's goal is substantially different from that of the board of education.

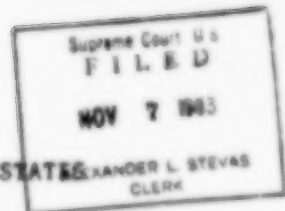
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The distinctions between the powers and duties of the county prosecutor and board of education are delineated in the statutes. Compare N.J.S.A. 18A:11-1 with N.J.S.A. 2A:158-5. It is obvious that the board of education is not subject to the same mandate as the prosecutor, to "use all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the laws." N.J.S.A. 2A:158-5. In contrast, administration and management of the school districts are properly understood to be the function of the board of education.

In this case the parties are even more distinct entities than in *Kugler*. There, as here, both parties were arms of the State. But in *Kugler*, both parties were involved in the enforcement of the law as well. And even though the prior prosecution in that case concluded with an acquittal, the court still found that it would not bar the latter proceeding. That court recognized the injustice which would result by permitting actions brought on behalf of the State under the Consumer Fraud Act to be barred by similar actions in municipal court. The same reasoning is applicable here. Although the board of education was involved in the hearing to reinstate the juvenile in school, its appearance cannot be found to adequately represent the State's prosecutorial interests. To allow the State to be bound in this case by the decision in the prior hearing would deny the State its opportunity to prosecute this juvenile and thereby carry out its mandate.

While there was a prior determination on the constitutionality of the search at issue here, the concepts of collateral estoppel, *res judicata* and double jeopardy do not dictate a bar to this proceeding. Consequently, the motion to dismiss is denied and the matter is to be listed for trial.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

No.

STATE OF NEW JERSEY,
Petitioner,

-v-
T.L.O.,
Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

No.

STATE OF NEW JERSEY,
Petitioner

-v-

T.L.O.,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of
New Jersey

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, T.L.O., respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the decision of the Supreme Court of New Jersey rendered in this case on August 8, 1983.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported as State in the Interest of T.L.O., 94 N.J. 331, 463 A.2d 934 (1983). The decision of the Appellate Division of the Superior Court is published at 185 N.J. Super. 279, 448 A.2d 493 (App. Div. 1982). The opinion of the trial court is reported at 178 N.J. Super. 329, 428 A.2d 1327 (J.D.R.C. 1980).

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

New Jersey Constitution of 1947, Article I, paragraph 7.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

New Jersey Constitution of 1947, Article VIII, section 4, paragraph 1.

The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.

N.J.S.A. 2A:4-60.

All defenses available to an adult charged with a crime, offense or violation shall be available to a juvenile charged with committing an act of delinquency . . . The right to be secure from unreasonable searches and seizures . . . shall be applicable in cases arising under this act as in cases of persons charged with crime.

N.J.S.A. 18A:25-2.

A teacher or other person in authority over such pupil shall hold every pupil accountable for disorderly conduct in school and during recess and on the playgrounds of the school and on the way to and from school . . .

N.J.S.A. 18A:37-1.

Pupils in the public schools shall comply with the rules established in pursuance of law for the government of such schools, pursue the prescribed course of study and submit to the authority of the teachers and others in authority over them.

N.J.S.A. 18A:6-1

No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary: (1) to quell a disturbance, threatening physical injury to others; (2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil; (3) for the purpose of self-defense; and (4) for the protection of persons or property; and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intendment of this section...

N.J.S.A. 18A:37-2(j)

. . . Conduct which shall constitute good cause for suspension or expulsion of a pupil guilty of such conduct shall include . . .

j. Knowing possession or knowing consumption without legal authority of alcoholic beverages or controlled dangerous substances on school premises, or being under the influence of intoxicating liquor or controlled dangerous substances while on school premises.

STATEMENT OF THE CASE

On March 7, 1980, a search was made by Theodore Choplik, Vice Principal of Piscataway High School, of a purse belonging to T.L.O., then a student at the school. Ms. Lenore Chen, a mathematics instructor had made a routine check of the girls' restroom. She observed T.L.O. and another girl smoking tobacco cigarettes. (TS 20-7 to 25) Although smoking by students was permitted in certain designated areas, it was not allowed in the restrooms. (TS 33-20 to TS 34-6) Ms. Chen ordered both girls to accompany her to Mr. Choplik's office, where she advised him of the infraction. (TS 21-1 to TS 22-23).

Upon being questioned, T.L.O. denied that she smoked. (TS 27-1 to 21) Mr. Choplik then asked T.L.O. to give him her handbag because when "she said to me she wasn't smoking, all right, that was to me to see if there was any proof that she was . . . and so my intent was to see if there was cigarettes inside, which would be a sign to me that she was smoking." (TS 31-1 to 13) When T.L.O. complied, Mr. Choplik opened the purse and "there was a package of Marlboros sitting right on the top there." (TS 28-3 to 11) He removed the cigarettes, showed the package to T.L.O., and accused her of lying. (TS 28-12 to 18) As he reached in and removed the Marlboros, Mr. Choplik also observed cigarette rolling papers in the purse. He removed them, and asked T.L.O. "what she was doing with these." She denied that they were hers. (TS 28-21 to TS 29-5) Mr. Choplik explained that "from then on I went to see what else was in there because from my experiences that seems to be a sign that someone is smoking marijuana." (TS 29-7 to 9)

Looking further into the handbag, he found a metal pipe, some empty plastic bags, and one plastic bag containing tobacco or some similar substance.* (TS 29-10 to 16) He also found a

* At trial it was stipulated that the bag contained 5.40 grams of marijuana. (T 12-17 to 25)

wallet containing "a lot of singles and change," and inside a compartment in the bag, two letters and an index card. (TS 36-7 to 10; TS 38-6 to 12; TS 40-20 to 22; TS 39-4 to TS 40-11). Mr. Choplik then called T.L.O.'s mother, and the police. (TS 41-8 to 10)

Mr. Choplik admitted that he did not tell T.L.O. at any time that she had a right to refuse to open her pocketbook. Her purse was closed when she gave it to him and he acknowledged that he could not see into it until after he opened it. (TS 47-14 to 25) He also agreed that at the time Ms. Chen initially accused T.L.O. of smoking, he had a sufficient basis to impose a sanction without need for further evidence. (TS 47-9 to 13)

The local police were summoned, and T.L.O. was subsequently taken to headquarters, accompanied by her mother. Upon arrival, Officer O'Gurkins advised the juvenile of her Miranda rights. (T 20-7 to T 21-3) When Mrs. O. indicated that she wanted to have an attorney present during questioning, she was permitted to telephone the office of Mr. Simon. (T 34-10 to 25) He was not there, so the officer was allowed to proceed with the interrogation. According to Mrs. O., her daughter at no time stated that she had sold marijuana. (T 35-15 to 22)

Officer O'Gurkins admitted that although it was standard practice in juvenile matters to reduce incriminating statements to writing, he did not follow this procedure with T.L.O. (T 24-12 to 18) He nevertheless maintained that T.L.O. had confessed that she had been selling marijuana in school for a week, charging \$1.00 per "joint." (T 22-2 to 17) He conceded that T.L.O. explained to him that the \$40.98, in singles and change, which was found in her purse, constituted the proceeds plus "tips" from her Courier-News paper route, which she had collected the night before. Officer O'Gurkins did not,

however, include this exculpatory information in his incident report. (T 23-12 to 18)

As a result of this incident, Middlesex County Complaint Number JD-1322-80 was filed charging the juvenile with possession of marijuana with intent to distribute. In addition, T.L.O. was suspended from school for seven days for possession of marijuana within school premises, and three days for smoking cigarettes in an area of the school where smoking was not permitted. See State in the Interest of T.L.O., 178 N.J. Super. 329, 428 A.2d 1327 (J.D.R.C. 1980)

A civil proceeding was brought by the juvenile in the Superior Court, Chancery Division against the Piscataway School Board to compel her reinstatement in school. Testimony was taken before the Honorable David Furman, J.S.C. on March 31, 1980. Judge Furman ruled that the search of the pocketbook was illegal and that the evidence found as a result could not be used against her. Accordingly he vacated the seven day suspension based upon the marijuana offense. (TC 26-1 to TC 27-22) The juvenile returned to school.

On September 26, 1980, a motion was brought before the Honorable George J. Nicola, J.J.D.R.C. to dismiss Complaint Number JD-1322-80 on the grounds that Judge Furman's decision on the legality of the search precluded further litigation of the matter. This motion was denied, the suppression question was relitigated, and the search was found by the Juvenile Court to be legal. State in the Interest of T.L.O., supra, 178 N.J. Super. at 342-45.

After a trial held on March 23, 1981, T.L.O. was found guilty of possession of marijuana with intent to distribute. On January 8, 1982, a probationary term of one year was imposed on the juvenile.

By letter dated February 9, 1982, T.L.O. was formally advised that she was suspended from school pending a formal hearing to expel her. The expulsion proceedings would be based

upon her having been adjudicated a delinquent for possession on March 7, 1980 of marijuana with intent to distribute.

A Notice of Appeal from the adjudication of delinquency was filed with the Appellate Division on February 11, 1982.

On February 10, 1982, a Notice of Motion to stay the adjudications of delinquency and to compel the school board to allow the juvenile to attend school during the pendency of the appeal was filed with the Middlesex County Juvenile and Domestic Relations Court, and ultimately granted by the Appellate Division on February 25, 1982. The juvenile was thereupon allowed to return to school.

The appeal was decided on June 30, 1982. State in the Interest of T.L.O., 185 N.J. Super. 279, 448 A.2d 493 (App. Div. 1982).

Judges Milmed and Gaulkin affirmed the denial of the motion to suppress the evidence secured by the search of the juvenile's purse, adopting the reasons set forth in the opinion of the trial court. However, they found that "neither the record nor the findings and conclusion of the trial judge are sufficient for us to determine the sufficiency of the Miranda waiver which was assertedly made by or on behalf of the juvenile immediately before her resumed questioning by the police officer." Id., at 448 A.2d 493. They therefore vacated the adjudication of delinquency and ordered a remand to the trial court "for further proceedings and findings and conclusions in light of the principles enunciated in Edwards v. Arizona, ___ U.S. ___, 68 L.Ed. 2d. 378 (1981) and State v. Fussell, 174 N.J. Super. 14 (App. Div. 1980)." Id.

Judge Joelson dissented, indicating that he would reverse the denial of the motion to suppress the evidence found in T.L.O.'s purse. Id. at 495.

A Notice of Appeal was filed with the New Jersey Supreme Court on July 16, 1982. Because the appeal was based upon the dissenting opinion, the only issue before the court was the legality of the search.

The companion case of State v. Engerud was certified directly to the Supreme Court, unheard in the Appellate Division. State v. Engerud, 93 N.J. 308, 460 A.2d 701 (1983) Argument was heard in both cases on May 10, 1983.

On August 8, 1983, the State Supreme Court rendered its judgment in both matters. Due to the death of defendant Jeffrey Engerud shortly thereafter, the prosecutor now petitions for a writ of certiorari only from the decision in State in the Interest of T.L.O.

REASONS FOR DENYING
THE WRIT

POINT I

THE DECISION OF THE NEW JERSEY SUPREME COURT WAS SUPPORTED BY INDEPENDENT AND ADEQUATE STATE GROUNDS.

Because it lacks jurisdiction to render advisory opinions, this Court has historically and consistently refused to review decisions which rest upon adequate and independent state grounds. Michigan v. Long, ---U.S.---, 103 S. Ct. 3469, 3475-76 (1983); Fox Film Corporation v. Muller, 296 U.S. 207, 210, 56 S.Ct. 183, 80 L.Ed. 158 (1935). Respondent submits that the opinion of the New Jersey Supreme Court in State in the Interest of T.L.O., 94 N.J. 331, 463 A.2d 934 (1983) is based upon such grounds, and that accordingly, the State's petition for a writ of certiorari should be denied.

It has long been settled that where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, the jurisdiction of the United States Supreme Court fails if the nonfederal ground is independent of the federal, and is adequate to support the judgment. Fox Film Corporation v. Muller, supra, 56 S.Ct. at 184; Klinger v. Missouri, 13 Wall. 257, 263, 20 L.Ed. 635 (1872) The basis for this rule was set forth at length in Herb v. Pitcairn, 324 U.S. 117, 125-26, 65 S.Ct. 459, 89 L.Ed. 789 (1945):

Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

The decision as to whether an asserted non-federal ground independently and adequately supports a judgment is the

prerogative of this Court. Olive State Bank v. Bryan, 282 U.S. 765, 773, 51 S.Ct. 252, 75 L.Ed. 690 (1931). Moreover, as is clear from the recently decided Michigan v. Long, *supra*, the sufficiency and the independence of the state ground must be apparent from the "four corners of the opinion." *Id.*, 103 S.Ct. at 3475.

In the instant matter, a review of the opinion below leads inescapably to the conclusion that the outcome rests upon sufficient state grounds, independent of and unaffected by federal constitutional considerations. First, it is clear that the decision below rests substantially on a local law which has no counterpart in the Federal Constitution. As the petitioner has correctly noted, this Court has never expressly decided the question of whether and to what extent juveniles are entitled to be free of unreasonable searches and seizures as set forth in the Fourth Amendment. In the New Jersey Code of Juvenile Justice, however, the Legislature has enacted a provision which guarantees to juveniles the same right to be secure from unreasonable searches and seizures as would be accorded to adults. N.J.S.A. 2A:4-60. This provision was expressly relied upon by the New Jersey Supreme Court. See State in the Interest of T.L.O., *supra*, 463 A.2d at 939, n. 5. Thus, should this Court decide that the Fourth Amendment applies only to adults, or that as petitioner urges, its protections apply to juveniles only in some attenuated form this aspect of the New Jersey Court's decision would remain unaffected; the New Jersey Court would still be required by the local statute to give juveniles parity with adults in this respect.

In addition, the T.L.O. decision is explicitly founded upon state constitutional grounds which accord New Jersey citizens rights and protections beyond that afforded by the Federal Constitution. At the very outset, the New Jersey Supreme Court noted that, "Young people and students are persons by the

United States and New Jersey Constitutions." (Emphasis supplied) State in the Interest of T.L.O., *supra*, at 938. Thus the court clearly signalled that the decision would have its roots in state as well as federal constitutional principles. In support of this proposition, the New Jersey Court compared N.J.S.A. 19A:6-1, which bans corporal punishment in New Jersey schools, with Ingraham v. Wright, 430 U.S. 651, 51 L.Ed.2d 711 (1977), in which reasonable corporal punishment of students is found not to violate the Eighth Amendment of the Federal Constitution. State in the Interest of T.L.O., *supra* at 938. The clear import of this comparison is to demonstrate that under New Jersey law, young people and students can be given greater protections than would be mandated by the Federal Constitution.

The court went on to state as one basis for its decision "the obligation of school officials to furnish a thorough and efficient education," (State in the Interest of T.L.O., *supra*, at 943), a clear reference to Article VIII, section 4, paragraph 1 of the New Jersey Constitution (1947).^{*} This constitutional provision guarantees to New Jersey children between the ages of five and eighteen certain educational rights; it has no counterpart in the Federal Constitution. Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973), *cert. den.* sub nom Dickey v. Robinson, 414 U.S. 976, 94 S.Ct. 292, 38 L.Ed.2d 219 (1973). See also State v. Hunt, 91 N.J. 338, 450 A.2d 952, 955 (1982). Moreover, the New Jersey Supreme Court does not merely pay lip service to this constitutional provision (as was the case in Michigan v. Long, *supra*, at 3477), but in the opinion evaluates the entire

* Article VIII, section 4, paragraph 1 states:

The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children of the state between the ages of five and eighteen years.

legislative scheme enacted to implement a thorough and efficient education before deciding the extent to which school students can be subjected to a search:

The Legislature has specifically charged school officials to maintain order, safety and discipline. The statutes give them authority to prevent disorderly conduct by pupils, N.J.S.A. 18A:25-2, and students are required to submit to such authority, N.J.S.A. 18A:37-1. Specifically, school officials have power to suspend pupils for illegal possession or consumption of drugs and alcohol, N.J.S.A. 18A:37-2(j), for assaulting teachers, N.J.S.A. 18A:37-2.1, or for other good cause. See N.J.S.A. 18A:37-2, -4. Other statutes allow them to deal specifically with pupils who are under the influence of drugs or alcohol, N.J.S.A. 18A:40-4.1 (principal should notify parent); N.J.S.A. 18A:35-4a (board of education shall establish policies and procedures for evaluating and treating alcohol users). Finally, N.J.S.A. 18A:6-1 grants specific power to seize weapons or other dangerous items and to quell disturbances.

Taken together, these statutes yield the proposition that school officials, within the school setting, have the authority to conduct reasonable searches necessary to maintain safety, order and discipline within the schools. State in the Interest of T.L.O., supra at 940.

* * *

We are satisfied that the Legislative scheme for public education in New Jersey contemplates a narrow band of administrative searches to achieve educational purposes. Id.

Since the educational guarantees of Article VIII, section 4, paragraph 1 have no corollary in the Federal Constitution, the New Jersey Court's reliance upon this ground is surely independent of any federal constitutional considerations. Moreover, in construing the constitutional mandate of a "thorough and efficient" education and its statutory implements, the New Jersey Court has a wholly sufficient basis to rule that school children can not be harassed by official searches except under certain narrowly limited circumstances.

Additionally, the T.L.O. decision is also rooted in Article

I, paragraph 7 of the New Jersey Constitution (1947).*

Although this provision is similar in wording to the Fourth Amendment, it has been repeatedly and specifically construed to guarantee more expansive protections. See e.g. State v. Alston, 88 N.J. 211, 440 A.2d 1311, 1319 (1981) (finding that under the State Constitution a person's ownership of or possessory interest in property confers standing for search and seizure purposes, despite the Rakas line of federal decisions); State v. Johnson, 68 N.J. 349, 346 A.2d 66, 67-68 (1975) (holding that under the State Constitution, if the prosecution wants to assert that a search was made pursuant to consent, the state has the burden of showing that defendant knew he could refuse); State v. Hunt, supra (requiring that under the State Constitution a warrant must be obtained to secure an individual's billing records from the telephone company, despite the decision in Smith v. Maryland, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979) that a telephone user has no Fourth Amendment expectation of privacy in phone company records.)

In deciding that a school official need not apply for a warrant, the New Jersey court did quote from Mincey v. Arizona, 437 U.S. 385, 390, 98 S.Ct. 2408, 51 L.Ed.2d 290 (1978), to the effect that a few narrow exceptions exist to the general rule requiring warrants. Id. at 939. However, two New Jersey cases were also cited in support of this proposition: State v. Patino and State v. Bruzzese. State in the Interest of T.L.O., supra. Both of these cases specifically rely upon Article I, paragraph 7 of the State Constitution. See State v. Patino, 83

* This provision reads as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particulars describing the place to be searched and the papers and things to be seized.

N.J. 1, 7 414 A.2d 1327, 1330 (1980); State v. Bruzzese, 94 N.J. 210, 463 A.2d 320, 323 (1983). In concluding that a warrant is not necessary because the school setting is akin to the "pervasively regulated business", the court again refers to federal cases, but it also relies upon In re Martin, 90 N.J. 295, 447 A.2d 1290, 1297 (1982), State v. Dolce, 178 N.J. Super. 275, 283, 428 A.2d 947, 952 (App. Div. 1981), and State v. Williams, 84 N.J. 217, 225, 417 A.2d 1046, 1050 (1980), cases based in part upon state constitutional or statutory grounds. State in the Interest of T.L.O., supra at 939-40.

With regard to the standard by which the legality of school searches must be evaluated, the New Jersey Court reviewed cases from both federal and other state jurisdictions, before choosing to adopt the "reasonable grounds to believe" standard espoused by the majority of cases. State in the Interest of T.L.O., supra at 940-41. While the New Jersey Court refers to several Fourth Amendment decisions, it also relies on In re Martin, supra, a case involving the question of the reasonableness of an administrative search of gambling casinos, decided pursuant to both the Federal and State Constitutions. State in the Interest of T.L.O., supra at 941. Similarly, in determining whether an exclusionary rule should be applied in the context of a search by an official other than a police officer, the New Jersey Court looked to the long-settled principles exemplified by such federal cases as See v. Seattle, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967); Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); and Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978), before answering in the affirmative. State in the Interest of T.L.O., supra at 939. This conclusion was, however, also specifically premised upon the New Jersey Code of Juvenile Justice. Id. at 939, n. 5.

Thus at each step of its legal analysis, the New Jersey

Court relied upon state as well as federal decisions.* Moreover, the mere presence of federal precedents in a state court opinion does not, in itself, compel the conclusion that the judgment was based upon federal grounds. A state court may choose to rely upon federal caselaw for guidance, in the same way that it might find opinions from the courts of sister states to be persuasive. Michigan v. Long, supra; Zacchini v. Scripps-Howard Broadcasting Co., 443 U.S. 562, 568, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977). Only if it appears that the state court felt bound and compelled by the constitutional considerations expressed in the federal decisions, and altered the application of its own law accordingly is the independence of the asserted state ground undermined. Id. While the New Jersey Supreme did utilize federal caselaw for guidance and reference, at no time in the opinion below did it express the view that it was bound by such precedents in construing its own law. Thus, it is clear from "the four corners of the opinion" that the decision is based upon adequate state grounds, and that this Court would be rendering an advisory opinion should a writ of certiorari be granted.

Moreover, contrary to the situation in Michigan v. Long, supra at 3478, n. 10, should this Court look to New Jersey case law beyond the scope of the T.L.O. opinion, it would be found that the Supreme Court of New Jersey has often construed the State Constitution to require greater rights and protections than have been held by this Court to be required by federal constitutional principles. See e.g. State v. Schmid, 84 N.J. 535, 423 A.2d 15 (1980) (ruling that the New Jersey "free speech" clause is more expansive than the First Amendment);

* By contrast, one of the reasons stated in Michigan v. Long, supra for concluding that the decision did not rest upon independent state grounds was the fact that the Michigan Supreme Court did not cite "a single state case" in support. Id. at 3477.

State v. Bellucci, 81 N.J. 531, 310 A.2d 666 (1979) (giving the state constitutional right to effective assistance of counsel more expansive protection than found in the Federal Constitution.) Thus, even a cursory review of New Jersey case law reveals an extensive and bona fide pattern of reliance upon the State Constitution for greater protections than mandated by federal law.

For these reasons, respondent maintains that the decision below is based upon adequate and independent state grounds.

POINT II

THE DECISION OF THE NEW JERSEY SUPREME COURT WAS IN ACCORDANCE WITH FEDERAL CONSTITUTIONAL LAW.

Petitioner contends that a writ of certiorari should issue because the New Jersey Supreme Court erroneously concluded that the Fourth Amendment exclusionary rule applies to evidence obtained as a result of the search of a student by a school administrator. As discussed at length in Point I, supra, respondent maintains that the decision below is based upon independent and adequate state grounds. However even assuming, arguendo, that such were not the case, it is clear that the opinion in State in the Interest of T.L.O., supra, is entirely in accordance with federal constitutional principles. Respondent therefore maintains that since the matter was correctly decided by the New Jersey Supreme Court, the State's petition for a writ of certiorari should be denied.

The petitioner specifically argues that evidence obtained as a result of a school search should not be suppressed because this Court's "Fourth Amendment exclusionary rule mandates have related exclusively to searches conducted by police officials." (Petition for Certiorari at 5) This contention is patently erroneous. It has long been settled that the Fourth Amendment gives protection against unlawful searches and seizures, and that this protection applies not merely against the police, but against any action by governmental agencies. Burdeau v. McDowell, 256 U.S. 465, 475, 41 S.Ct. 574, 65 L.Ed. 1048 (1921).

As this Court more recently stated in Michigan v. Tyler, 436 U.S. 499, 504-05, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978),

The decisions of this Court firmly establish that the Fourth Amendment extends beyond the paradigmatic entry into a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of crime. As this Court stated in Camara v. Municipal Court, 387 U.S. 523, 528, 18 L.Ed.2d 930, 87 S.Ct. 1727, the "basic purpose of this Amendment . . . is to

safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." The officials may be health, fire, or building inspectors. Their purpose may be to locate and abate a suspected public nuisance, or simply to perform a routine periodic inspection. The privacy that is invaded may be sheltered by the walls of a warehouse or other commercial establishment not open to the public. See *v. Seattle*, 387 U.S. 541, 18 L.Ed.2d 943, 87 S.Ct. 1737, *Marshall v. Barlow's Inc.*, ante at 311-313, 56 L.Ed.2d 305, 98 S.Ct. 1816. These deviations from the typical police search are thus clearly within the protection of the Fourth Amendment.

Thus, the protections of the Fourth Amendment exclusionary rule have been specifically held to apply to such non-police governmental officials as building inspectors (*Camara v. Municipal Court*, *supra*), firemen (*Michigan v. Tyler*, *supra*), occupational safety inspectors (*Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978)).

Indeed the decision in *Burdeau v. McDowell*, *supra*, mistakenly relied upon by the petitioner in support of this argument, at no time limits itself to law enforcement officers; the Court refers to searches by "governmental agencies," "official(s) of the federal government," and "sovereign authority." *Id.* at 475. The search held to be outside the ambit of the Fourth Amendment in that matter was conducted by the defendant's employer, i.e. a private citizen. *Id.*

This Court has on numerous occasions found teachers and school administrators to be governmental agents for constitutional purposes. See e.g. *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); *Tinker v. Des Moines, etc. School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 723 (1969); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

As this Court held in *Barnette*, *supra*, at 63 S.Ct. 1185:

"The Fourteenth Amendment, as now applied to the states, protects the

citizen against the State itself and all of its creatures -- Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights."

Similarly, in *Tinker*, *supra*, at 89 S.Ct. 739, this Court ruled:

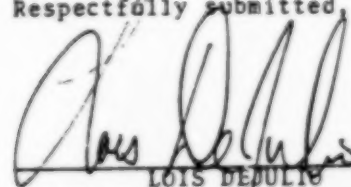
"In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."

Thus, the decisions of this Court compel the conclusion that school administrators are governmental officials rather than private citizens for federal constitutional purposes. The New Jersey Supreme Court's ruling suppressing evidence discovered as a result of an illegal search by a high school principal was entirely in accord with Fourth Amendment considerations.

CONCLUSION

For these reasons, it is respectfully urged that the
Petition for a Writ of Certiorari be denied.

Respectfully submitted,



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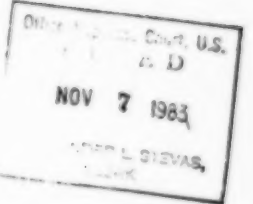
Of Counsel and on the Petition

MOTION FILED
NOV 7 1983

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1983

No. 83-7124



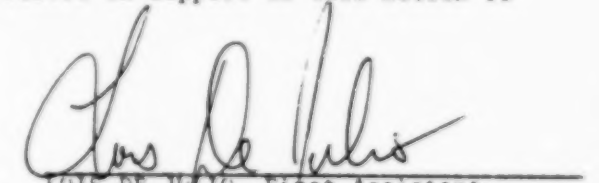
THE STATE OF NEW JERSEY, Petitioner,

v.

T.L.O., Respondent.

The Respondent, T.L.O., asks leave to file the attached
Brief in Opposition to a Petition for a Writ of Certiorari to the
Superior Court of New Jersey, Appellate Division without prepayment
of costs, and to proceed in forma pauperis pursuant to Rule 46.

The Respondent's affidavit in support of this motion is
attached hereto.



LOIS DEJULIO, First Assistant
Deputy Public Defender
COUNSEL FOR RESPONDENT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1983

No. _____

THE STATE OF NEW JERSEY, Petitioner,
v.
T.L.O., Respondent.

AFFIDAVIT

I, Terry L. Owens, of full age, being duly sworn according to law, depose and say in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the Respondent in the above-entitled case.
2. Although I was a juvenile at the commencement of this matter, I became eighteen years of age on April 24, 1983.
3. Because of my poverty, I am unable to pay the costs of said cause.
4. I am unable to give security for the same.
5. I believe that I am entitled to the redress I seek in said case.
6. I graduated from high school in June of 1983. Although I am actively seeking work, I am not presently employed.
7. Over the past twelve months, I have earned \$990. from part-time employment while attending school.
8. I do not own any cash or checking or savings accounts.

9. I do not own any real estate, stocks, bonds, notes, automobiles or other valuable property.

10. I was represented on appeal in the New Jersey Courts by the Office of the Public Defender. I qualified as being an indigent person under their standards.

11. I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Terry Owens
TERRY L. OWENS

Sworn and subscribed to
before me on this 1st
day of NOVEMBER, 1983

John H. Lane
My Commission Expires 11-7-85

**IN THE
Supreme Court of the United States**

October Term, 1983

State of New Jersey,
Petitioner,

v.

T.L.O., a Juvenile,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

MOTION TO APPEAR AS AMICUS CURIAE, AND
BRIEF AMICUS CURIAE IN SUPPORT
OF PETITIONER

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THOMAS A. SHANNON
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National School Boards Association

NO. 83-712
IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

State of New Jersey,
Petitioner,

v.

T.L.O., a Juvenile,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

MOTION TO APPEAR AS AMICUS CURIAE, AND
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THOMAS A. SHANNON
Executive Director
National School Boards Association

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

State of New Jersey,
Petitioner,

v.

T.L.O., a Juvenile,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

MOTION TO APPEAR AS
AMICUS CURIAE IN SUPPORT
OF PETITIONER

The National School Boards Association
(NSBA) moves this Court for leave to
participate as amicus curiae herein, for the
purpose of filing the attached brief in
support of the Petitioner. Counsel for the
parties have not consented.

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

This case arises out of an effort by school officials to deal with discipline and drugs in the school -- issues which are of major concern to school districts throughout the country, as well as to the parents of the children who are entrusted to the schools' care.

However, the parties in this action are

concerned solely with the issue of the admissibility in a quasi-criminal proceeding of evidence procured through a school search. The parties are unlikely to bring to the attention of this Court the important considerations of school discipline and the education and safety of public school children. Amicus believes that to reach a workable solution in the instant case these considerations should be addressed by this Court.

The precedent that will be set by this Court in the case at bar will affect the ability of school officials nationwide to carry out their appointed tasks -- educating students, instilling values and protecting them from harm in the schools.

The Court could decide this case on the narrow evidentiary issue presented by the parties. However, given the problem of crime, drugs and discipline in the schools today,

amicus urges this Court to look at the broader picture.

Regardless of how the Court's rules in this case, its decision will have a direct impact on school districts throughout the country. Thus, the National School Boards Association urges this Court to grant it leave to present its views.

Respectfully submitted,

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NO. 83-712

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

State of New Jersey,
Petitioner,

v.

T.L.O., a Juvenile,
Respondent.

AMICUS CURIAE BRIEF OF
THE NATIONAL SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS

National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school

boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The problems of drugs and crime in the schools and of school discipline in general are of major concern to school districts throughout the country, as well as to the parents of the children who are entrusted to the care of the districts.

School boards across the country are concerned that decisions such as that of the court below will seriously undermine their ability to enforce school rules and discipline in a manner which will neither endanger the innocent nor result in life-long criminal stigmas for the guilty.

Amicus is also concerned about the precedent in this case which, although technically involving only criminal standards, will be applied by lower courts to purely

civil matters involving school discipline.

ISSUE PRESENTED FOR REVIEW

Whether the Fourth Amendment to the United States Constitution, U.S. Const., amend. IV, applies to searches of students by school officials conducted for the purpose of enforcing school rules?

ARGUMENT

I. INTRODUCTION

The petition for a writ of certiorari presents for this Court's review the question of whether the exclusionary rule developed under the Fourth Amendment applies to searches conducted by public school officials and teachers in the school. Before that issue is reached, however, it is the firm belief of amicus National School Boards Association that a more important threshold question must first be addressed -- whether the Fourth Amendment

is even applicable to searches conducted by school officials in the context of enforcing school rules and maintaining order and discipline. Because of the need to maintain discipline and protect children compelled by law to be present in the schools, amicus submits that the Fourth Amendment's standards should not be transplanted by the courts from the criminal enforcement context into the classroom.

II. SCHOOL SEARCHES ARE A NECESSARY TOOL FOR MAINTAINING DISCIPLINE, ORDER AND SAFETY

Every state in this nation mandates, in one form or another, that children of certain prescribed ages attend school. P. Lines, "Private Education Alternatives and State Regulation," Education Commission of the States (1982). Faced with compulsory attendance laws, parents across the country entrust their children to the care of the schools, expecting the schools not only to

educate but also to protect the students in their custody. Unfortunately, however, schools are being confronted by a rising tide of drugs, weapons, and disorderly conduct that makes their protective duties more and more difficult. School searches are a vital tool in the struggle to protect other students from dangerous instrumentalities such as weapons and drugs, and to enforce school rules in a fair, certain and immediate fashion.

Recent estimates show that nearly three million school children may be the victims of crime each month. See Appendix A. Though students between the ages of 12 and 19 spend only about 25% of their waking time in school, it is estimated that 36% of all assaults and 40% of all robberies against this group occur while they are in school. National Institute of Education, Violent Schools--Safe Schools: The Safe School Study Report to the Congress 31-32 (1978). Ironically, it would almost

appear that students are safer on the streets than in the classroom.

Nor are the effects of crime in the school limited to purely physical factors. Students living in an atmosphere of fear cannot possibly receive the full benefits of their education. Surveys show that 4% of students may stay home from school each month because of their fear of becoming yet another victim of crime in the schools. See Appendix B.

Certainly, it is not the intent of amicus to convey the impression that schools are nothing more than armed camps. They are not. However, the efforts undertaken by schools attempting to alleviate the problem are continually being thwarted by judicial decisions such as that of the court below.

Schools are not only in the business of instilling book learning, but also of teaching moral values and discipline through the

orderly, certain, and immediate implementation of school rules. The student infringing school rules benefits little by having his or her conduct ignored and even less by having it referred to the criminal justice system. The ideal way to handle the matter is to show the students that their violations of school rules will lead to immediate and certain action against them by school authorities. They must be taught that rules are to be obeyed or immediate consequences will follow. Students are children, not adults, and need and want this type of certainty in their lives.

Unfortunately, today's criminal justice system is neither certain nor immediate. If anything, the criminal justice system teaches students that the law protects the wrongdoer. This is not to say that the criminal justice system is invalid, especially when applied to accused criminals faced with a possible loss of liberty. But the rules in effect for that

system have no place in the public schools, which should operate in much the same manner as parents operate their disciplinary system at home.

According to one study, only three percent of the referrals to juvenile courts come from the schools. Report to the Nation on Crime and Justice 60 (1983). It is clear that schools are attempting to deal with the problem of crime internally, through the usual procedures available to them -- procedures which in the past have included searches of students' purses, pockets and lockers. They are acting not as surrogates for the criminal justice system, but rather, as surrogates for the parents, teaching the difference between right and wrong:

In the school, as in the family, there exists on the part of the pupils the obligations of obedience to lawful commands, subordination, civil deportment, respect for the rights of other pupils and fidelity

to duty. These obligations are inherent in any proper school system, and constitute, so to speak, the common law of the school. Every pupil is presumed to know this law Interest of L.L., 280 N.W.2d 343, 349, citing State ex rel Burpee v. Burton, 45 Wis. 150, 155 (1878).

Similarly, in the case at bar, the principal who searched the student was less interested in getting evidence to support a school disciplinary proceeding or a criminal investigation than in expressing his displeasure with the lie the student was telling him by claiming not to smoke although she had cigarettes in her purse. The court below, unfortunately, concerned itself with criminal justice concepts of "plain view" and the fact that the principal, upon being told by the student that she didn't smoke, searched her purse and removed a package of cigarettes. Thus the court, using search standards established in the criminal setting, reasoned that the principal had no cause for his actions. The school's real interest,

however, which went unrecognized by the court, was in instilling the virtue of telling the truth, not in obtaining evidence for a criminal prosecution. Thus, standards such as "plain view" should not even have been brought to bear.

It is important that courts understand that the education system is not a court, not a police station, and that school officials are not law enforcement agents. Respect for the laws of the land and for the rules of the school is important for all students to learn. Strict enforcement of school rules is the surest and least obtrusive means for achieving respect, and the methods, including searches, should be left to the educators, not the courts.

III. THE FOURTH AMENDMENT WAS NOT INTENDED TO APPLY IN THE SCHOOL SETTING

Apart from the special needs of school officials to educate and protect students

entrusted and compelled to be in their care, the history of the Fourth Amendment provides further support for the belief of amicus that the Fourth Amendment's prohibitions have no place in the classroom.

The Fourth Amendment was originally formulated in response to the general warrants in England and the writs of assistance in the Colonies, which gave the holder broad power, for life, to search and seize property at will. W. Ringel, Searches and Seizures, Arrests and Confessions 2-3 (1972). The first mention of the colonists' displeasure with then prevalent search and seizure practices appears in the writings of Samuel Adams, who in 1772 helped compile a report on the "Rights of the Colonists and a List of Infringements and Violations of Rights." The venom of the people against the writs and those executing them is eloquently expressed by Adams:

Thus, our houses and even our bedchambers are exposed to be

ransacked, our boxes chests and trunks broke open ravaged and plundered by wretches whom no prudent man would venture to employ even as menial servants Those Officers may under colour of law and the cloak of a general warrant break thro' the sacred rights of the Domicil, ransack mens houses ... and with little danger to themselves commit the most horred murders. Adams, "The Rights of the Colonists and A List of Infringements and Violations of Rights," in 2 The Writings of Samuel Adams 350-69, (H.A. Cushing 1906).

James Madison's original proposal for the Fourth Amendment similarly concerned itself with warrants and the home, and did not even mention more general "unreasonable searches and seizures," but only that "the right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause" An amendment during House debate on the Bill of Rights added the language relating to "unreasonable searches and seizures." 1 Annals of Congress 685-792 (August 17, 1789).

Originally, courts held that the Fourth Amendment's prohibitions did not apply to searches conducted by state officials, but only to federal authorities. Federal officials would thus attempt to circumvent search and seizure rules by having state authorities present to them "on a silver platter" evidence illegally obtained for use in federal court prosecutions, a practice which came to a halt with this Court's decision in Elkins v. United States, 364 U.S. 206 (1960). Ultimately, in Mapp v. Ohio, 367 U.S. 643 (1961), this Court held that the Fourth Amendment is incorporated into the Fourteenth Amendment and thus applies to state as well as federal officials. Of course, all of these cases arose out of searches conducted by law enforcement officials for the purpose of obtaining criminal convictions.

Running throughout the cases interpreting the Fourth Amendment are several consistent

threads. Though decisions interpreting the Fourth Amendment have extended its protections from the home to motor vehicles and other areas, in each instance, it can be argued that there is a high expectation of privacy, an expectation which does not exist in the school setting. Further, even cases which do not involve criminal justice officials such as policemen do involve law enforcement agents of one type or another. See, e.g., Camara v. Municipal Court, 387 U.S. 523 (1967). These law enforcement officials, like police officers, are primarily devoted to the cause of detecting violations of the law, unlike school officials, for whom such activities are a mere adjunct to their primary duty of educating and caring for the children in their charge.

This "legislative history" and the distinctions drawn above are vital to an equitable resolution of the case at bar. This

Court need not overrule its earlier decisions to hold here that there is no Fourth Amendment right in the schools where a search is conducted to enforce school rules and maintain order, rather than to hand over evidence to law enforcement officials "on a silver platter." It is clear that the Fourth Amendment was intended to protect accused persons from unreasonable criminal or quasi-criminal procedures, not students being taught the difference between right and wrong.

IV. CRIMINAL JUSTICE STANDARDS ARE NOT TRANSFERABLE TO THE SPECIAL SETTING OF THE SCHOOL

Lower courts have attempted, as did the lower court in the case at bar, to adopt lesser standards of "reasonable" in determining whether a violation of the Fourth Amendment has occurred. However, the standards are difficult, if not impossible, to apply in the educational setting, particularly

since the standards are designed for the criminal context but must be applied in a civil context.

Several state courts have articulated a standard of "reasonable suspicion," a standard traceable to this Court's decision in Terry v. Ohio, 392 U.S. 1 (1968). Terry, however, involved a criminal search, and attempts to apply such standards in the school discipline context often results in arbitrary and unpredictable decisions.

For example, in People v. Singletary, 37 N.Y.2d 311, 333 N.E.2d 369 (1975), a New York court upheld the search of a student as the result of a tip from another student who had identified drug offenders on five previous occasions. But the same court, in People v. D., 34 N.Y.2d 483, 315 N.E.2d 466 (1974), refused to find "reasonable suspicion" to justify a search on the basis of a "confidential source," and observations of the

student making two brief trips to the bathroom, each time with two different students. Other inconsistent interpretations of "reasonable suspicion" can be found in State v. Baccino, 282 A.2d 869 (Del. Super. 1971); M.J.S. v. State, 409 So.2d 1209 (Fla. App. 1982); State v. Feazell, 360 So.2d 907 (La. App. 1978); and L.L. v. Circuit Court of Washington County, 90 Wis.2d 585, 280 N.W.2d 343 (1979).

The court below cites a standard adopted in earlier cases, calling for school officials, before conducting a search, to consider "the child's age, history and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay, and the probative value and reliability of the information used as a justification for the search." New Jersey v. T.L.O., 463 A.2d 934, 942 (1983) (citations omitted).

Yet in applying the standard it discounts as unreasonable the fact that the principal had been observing Engerund for some time and that a teacher had seen T.L.O. smoking in the restroom, because these observations do not squarely fit into criminal justice standards on anonymous tips and probable cause.

Such standards would be well utilized if the school official was acting as a law enforcement officer. But school officials are primarily educators, not enforcers and act to protect the other children in their charge, as well as to ensure that school regulations and order are maintained. If there is only a rumor that a child is carrying a gun -- that child should be searched immediately, regardless of whether the suspicion is reasonable as that term is used in the criminal context. For example, in March of 1983, two third-grade students were found with a fully-loaded .45-caliber gun inside one of

the students' desks. Miami Herald, 3/10/83, p. 1C. Should schools be prohibited from searching for weapons merely because they lack probable cause sufficient to obtain a criminal warrant? Of course not. No harm is done if the search is to no avail, but a child's life may have been saved if the search produces a weapon.

The mechanistic rules of the criminal context simply have no place in the setting of the school and the classroom. Rules such as the "clear view" doctrine, cited by the court below, and the "reasonable suspicion" standard which has been suggested as a substitute for probable cause, are all unnecessarily rigorous. As stated by the Georgia Supreme Court in State v. Young, 234 Ga. 488, 496, 216 S.E.2d 586, 592 (1975): "Teachers and administrators must be allowed to search without hindrance or delay subject only to the most minimal restraints necessary to insure

that students are not whimsically stripped of personal privacy and subjected to petty tyranny."

Teachers in a classroom are charged with the responsibility of maintaining order. Although one suspected of a crime could not (without probable cause) be ordered by a police officer to empty his pockets or open her purse, surely our forefathers did not intend to require a teacher to meet criminal standards of probable cause or even "reasonable suspicion" in order to look through a child's desk for the slingshot which sent a stone at another, or for the gum being chewed against school rules. Surely our forefathers did not intend the Fourth Amendment to require probable cause or reasonable suspicion before a principal could open a student's locker in the search for a gun reported by an anonymous tip to be there. Should our school officials be forced to wait

until drugs are sold or a child is harmed before they are allowed to take action?

Just as school authorities view corporal punishment as a less drastic means of discipline than suspension or expulsion, Ingraham v. Wright, 430 U.S. 651, 657 (1977), so school authorities view the informal enforcement of school rules through searches, discussions with the student, and even suspensions and expulsions as less drastic means of discipline than turning the schools into a criminal justice system with probable cause proceedings, formal advising of rights and calling in the police authorities, with the attendant permanent damage to the student such a process may entail. As one court, in praise of a school's efforts stated:

Without the intervention of law enforcement officers, and with little or no disruption of school activities or discipline, they conducted an informal investigation of the reported matter. Their information may not have proved to

be valid, but their action insured that the adverse effect on the student's well-being, on his present and future emotional reaction to the event, as well as on the several societal interests concerned, would be kept at a minimum. In re G., 11 Cal. App. 3d 1193, 1197 (1970).

In discounting the notion that school officials be viewed as standing in loco parentis rather than as officers of the state, the lower court notes that parents infrequently search their children and turn them over to the police for prosecution. New Jersey v. T.L.O., 463 A.2d at 938, n.4. Yet studies show that only about three percent of the referrals to juvenile courts come from the schools, the same percentage as are referred by parents. Report to the Nation on Crime and Justice 60 (1983).

The lower court in New Jersey v. Engerud, a companion case to T.L.O. mooted by the death of the student, noted that its opinion was not intended to "disparage the school officials'

actions in these cases. They must often, as here, act on short notice based on the information that they possess. Such officials have immunity from damages for claims resulting from their good faith judgments." The court cited Wood v. Strickland, 420 U.S. 308 (1975), to support its analysis on "good faith." However, other lower courts interpret the "good faith" test as applying only where the law in an area is unsettled, not where school officials subjectively believe their actions were correct. If the Fourth Amendment is applied to the schools, teachers and administrators will be subjected to damage actions where searches are held to be unreasonable, even though those officials believed in "good faith" that their actions were reasonable under the circumstances. In order to avoid such actions, school officials will simply stop making searches at all, which could have dire consequences for all children

-- the guilty as well as the innocent.

Certainly, no school official would seriously argue, in light of this Court's decisions, that students shed their constitutional rights "at the schoolhouse gate." Tinker v. Des Moines Independent Community School District, 343 U.S. 503 (1969). But in the context of the classroom, students have different rights than those persons being processed through the criminal justice system. The convicted felon has rights under the Eighth Amendment; the student does not. Ingraham v. Wright, 430 U.S. 651 (1977). Even Constitutional guarantees which are not directed toward the criminal justice system, such as those arising under the First Amendment, are very much different in the schoolhouse setting. See Island Trees Union Free School District v. Pico, 457 U.S. 853 (1982).

Both precedent and common sense dictate a

determination by this Court that portions of the Constitution, specifically the Fourth Amendment, are neither necessary nor applicable in the context of maintaining school discipline.

V. STUDENT LOCKERS ARE NOT PROTECTED BY THE FOURTH AMENDMENT

Although the companion case to this action, N.J. V. Engerud, is technically moot because of the death of the defendant, it is necessary to discuss that case in the context of any discussion of the Fourth Amendment's place in the schools. In that case, the court below determined that there was an "expectation of privacy" which the student possessed in his locker -- his "home away from home," -- and that school officials could therefore not search the locker without the student's permission.

The search of the locker was based on an anonymous tip and on the subjective suspicions

of the principal. The court applied the three prong test of Aguilar v. Texas, 378 U.S. 108 (1964), a criminal case, to determine the reliability of the tip, and held that it failed to meet that test. It is the position of amicus that it is simply inappropriate to require school officials attempting to maintain order and protect the well-being of the children entrusted to their care, to have to meet these types of tests, which are designed to protect the accused within the criminal justice system, not students in a school.

As noted above, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed" United States v. United States District Court, 407 U.S. 297, 313 (1971). The lower court opinion to the contrary notwithstanding, the public school student's locker is not his castle, nor is there a reasonable expectation

of privacy in the school. Most other courts have held that since schools have control over student's lockers, there is no expectation of privacy in the lockers. See, e.g., Overton v. Rieger, 311 F. Supp. 1035 (S.D.N.Y. 1970); In the Matter of Christopher W., 105 Cal. Rptr. 775 (Ct. App. 1973); In re Donaldson, 75 Cal. Rptr. 220 (Ct. App. 1969); People v. Lanthier, 448 P.2d 625, 628 (Sup. Ct. Cal. 1971). See generally, Annot., Admissibility in Criminal Case of Evidence Obtained by Search Conducted by School Official or Teacher, 49 A.L.R.3d 978, 979. The New Jersey Supreme Court, however, has said that such an expectation of privacy does exist unless the school has a policy of regularly inspecting students' lockers. Thus, even if the school had a written policy to the effect that lockers could be opened at any time by school officials, it would probably still not be enough to meet the New Jersey court's

standard, without a regular inspection practice.

VI. ALTERNATIVES EXIST TO THE FOURTH AMENDMENT TO PROTECT STUDENTS' CONSTITUTIONAL RIGHTS

It has been argued that to exempt schools from the application of the Fourth Amendment would leave students with no remedy for gross acts by school officials against their person. That, of course, is not true. Amicus argues not for an exemption of the schools from the Constitution, only from its Fourth Amendment, which was not intended to and indeed should not apply in the classroom. Other Constitutional provisions would continue to protect students from severe abuses arising from searches. For example, where searches or punishment for infractions are discriminatory in application, the Equal Protection Clause may come into play. Where a particular search oversteps the bounds of necessity in a given

situation or otherwise "shocks the conscience of the Court," the student may assert a violation of liberty interests as well as common law remedies. The value of such alternatives can best be demonstrated by decisions such as Rochin v. California, 342 U.S. 165 (1951), a decision arising before the Fourth Amendment was found to apply to the states. In Rochin, this Court overturned a state conviction because the search (pumping the stomach of the defendant to recover morphine capsules) so "shocks the conscience" that it amounted to a denial of due process.

Thus, several lower court cases involving student searches might well have been successfully litigated under the due process clause. Strip searches of young children, where no danger to other children is involved, may be an example of conduct gross enough to raise constitutional implications. See, e.g., Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y.

1977). If, as stated by the court in Doe v. Renfrow, 631 F.2d 91, 92, reh'g denied, 635 F.2d 582 (7th Cir. 1980), cert. denied, 451 U.S. 1022 (1981), "it does not require a constitutional scholar to conclude that [the search] is an invasion of constitutional rights of some magnitude," then the Rochin doctrine would clearly apply and there would be no need to resort to the Fourth Amendment to protect the student's rights.

Common law damage actions may also be an adequate remedy for gross violations resulting from searches of students' persons. In Ingraham v. Wright, 430 U.S. 651, this Court, in holding that the Eighth Amendment's proscription against "cruel and unusual punishment" does not apply to the schools, noted that the common law (and the state's statutory remedies) adequately protects students against abusive imposition of corporal punishment in the schools. The

rational of the Court in Ingraham applies equally to an analysis of the Fourth Amendment:

The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner. Id. at 670.

VII. CONCLUSION

In a recent Gallup Poll survey respondents were asked to name the biggest problems facing their public schools. They chose lack of discipline (named by 25% of respondents) and use of drugs (named by 18% of respondents) as the top two problems in the schools. Phi Delta Kappan, Sept., 1983.

School board members, school teachers, principals and other school officials are attempting to deal with this problem through internal procedures which will teach students, without imposing life-long criminal stigmas.

Judicial decisions such as that below, threaten to erode the ability of local school officials to carry out this mission by changing the long-standing relationship of student and teacher, and student and principal, from one revolving around a learning environment and the teaching of values to one of policeman and suspect. "Courts should not 'intervene' in the resolution of conflicts which arise in the daily operations of school systems' unless 'basic constitutional values' are 'directly and sharply implicated' in those conflicts." Island Trees Union Free School District v. Pico, supra.

Clearly, the Fourth Amendment is not a Constitutional value which is directly or sharply implicated where a school principal is acting in the capacity of educator and supervisor of school discipline policies in the manner described in the case below. Where

school officials take on the role of surrogate law enforcement officer, a different rule might attach. That, however, is not the situation here. Here the school personnel were not taking on the role of "sovereign" where, according to Justice Rehnquist's analysis in Island Trees, supra, the Constitutional duties may be different. Instead, the personnel were acting in the role of "government as educator."

There is a need, in order to protect innocent students as well as to teach the guilty, for school personnel to have a free hand, within the bounds of good taste, to search the property of students within their charge. Such searches do not implicate Fourth Amendment considerations unless the school personnel are acting as surrogate law enforcement officers for the purpose of handing over evidence to the criminal justice system "on a silver platter."

Further, a finding that the Fourth Amendment does not apply to school administrative searches will not leave students unprotected. Should a search overstep the boundaries of good taste and "shock the conscience," other Constitutional and common-law rights would be implicated and students would have the full protection of the laws to seek damages or other relief against offending officials and the school district itself.

New "reports" and "studies" present simplistic solutions to the problem of crime in the schools, advocating more reporting, by the school of criminal activity on school property, and implying that less effort should be made to advise students of their rights. That is certainly not what is advocated by amicus. Amicus believes only that the Fourth Amendment does not apply in the context of school personnel enforcing school rules and

protecting the health and safety of students. Amicus continues to believe that students do, and should, have Constitutional rights in the school. However, because of their youth, inexperience and their need for protection in the educational environment, society must not treat children in school in the same manner as criminal suspects are treated in the criminal justice system.

APPENDIX A**EXTENT OF CRIME AND VIOLENCE IN THE SCHOOLS**

In the only nationwide study released to date on the incidence of crime and violence in our nation's schools, it was found that, at a minimum, two and one-half million students are the victims of crime in America's public schools in a typical month. "Safe Schools--Violent Schools," The Safe School Study Report to Congress¹ a survey of over 4,000 schools, chronicles the extent of both student and teacher victimization in our schools. Among the findings:

- **Eight percent** of the nations schools are seriously affected by crime, violence, and disruption.
- **Thirty percent** of all assaults and 40% of all robberies reported by people age 12-19 occurred in school, although students spend only about 25% of their active time in school.

¹ National Institute of Education, Safe Schools--Violent Schools, The Safe School Study Report to Congress 1978). The study was undertaken in response to Congress's request that HEW determine the extent and seriousness of crime in the schools.

- One out of every 9 secondary school students, or 2.4 million have something worth more than \$1 taken from them in a month's time. Twenty percent of these thefts involved items valued over \$10.
- One out of every 75 secondary school students, or over one-quarter million, are attacked at school each month. Forty-two percent of these attacks involve some injury to the student, and 4% of these are serious enough to require medical treatment.
- One of every 200 secondary school students have something taken from them by force, weapons, or threats in a typical month. Nine percent of these robberies involve injury to the student victim. Nearly one-quarter of these robberies involved losses over \$1.
- Twelve percent of secondary school teachers, or one out of every eight, reported having something worth more than \$1 stolen from them in a typical month. More than 20% of these thefts involved losses greater than \$10.
- About .5%, or one out of every 200 secondary school teachers is attacked each month. Nearly one-fifth of these attacks is serious enough to require medical treatment. A teacher has a five times as greater a chance as a student of being hurt if attacked.
- The odds of secondary school teachers having something taken from them by force, weapons, or threats at school in a typical month are 1 in 170. About one-fourth of these robberies involve losses of more than \$10.

APPENDIX B

CONSEQUENCES OF SCHOOL VIOLENCE

In addition to the far-reaching physical effects of school violence, wide ranging psychological consequences were also noted by the Violent Schools--Safe Schools study. Among these:

- Twenty-two percent of all secondary students reported avoiding some restrooms at school because of fear.
- Sixteen percent avoiding three or more places at school because of fear.
- Twenty percent of the students said they are afraid of being hurt or bothered at school at least sometimes.
- Three percent reported that they are afraid most of the time.
- Four percent actually stayed home from school in the previous month because they were afraid.

In addition to the anxieties suffered by the students, teachers also expressed fear and trepidation arising out of school violence and hostile confrontations with students.

- Twelve percent of secondary school teachers said they had been threatened with injury by students at the school.
- Twelve percent of the teachers said they hesitated to confront misbehaving students because of fear.
- Almost half of the teachers reported that some students had insulted them or made obscene gestures at them in the last month.

*SOURCE: "Violent Schools--Safe Schools," The Safe School Study Report to the Congress, Vol. 1, p. 5. (1978).

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

THE STATE OF NEW JERSEY,
Petitioner,
v.
T.L.O., A JUVENILE,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

MOTION FOR LEAVE TO FILE A BRIEF
AMICUS CURIAE OF THE
WASHINGTON LEGAL FOUNDATION
AND BRIEF OF *AMICUS CURIAE*,
THE WASHINGTON LEGAL FOUNDATION

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January 12, 1984

QUESTION PRESENTED

Whether the exclusionary rule, a procedural safeguard rather than a constitutional right, fashioned by this Court primarily to deter the conduct of law enforcement officers violating Fourth Amendment rights, should be applied to a search of a student's purse during regular school hours by a public school administrator.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-712

THE STATE OF NEW JERSEY,
Petitioner,

v.

T.L.O., A JUVENILE,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

**MOTION OF THE WASHINGTON LEGAL FOUNDATION
TO FILE A BRIEF *AMICUS CURIAE***

The Washington Legal Foundation (WLF or Foundation) moves this Court pursuant to Rules 42 and 36 of the Supreme Court Rules for leave to file the annexed brief *amicus curiae* in the above-captioned proceeding. Counsel for both Petitioner and Respondent have neither consented nor opposed the filing of this brief. Petitioner tentatively consented by telephone conversation but written consent had not been received by movant by the time this brief was sent to the printers. Citing insufficient time, Respondent declined to consent to movant's participation as *amicus curiae*.

The Washington Legal Foundation is a non-profit, public interest law firm organized and existing under the

laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. The Foundation has more than 85,000 members and 120,000 supporters throughout the United States whose interests the Foundation represents.

WLF participates in and devotes a substantial portion of its resources to matters raising criminal justice and related constitutional issues. The Foundation has recently inaugurated a "Drug Alert" Project designed to encourage and support efforts to curb the alarming increase of illegal drug use especially by this country's youth. Among other activities, WLF provides legal assistance, guidance and educational materials to parent-teacher groups, drug rehabilitation centers and municipalities interested in curbing drug abuse which leads to wasted and destroyed lives. WLF participates in court cases which implicate the proper administration of justice in this area.

The Foundation has been allowed to appear before this Court as *amicus curiae* in many cases dealing with criminal justice issues. See, e.g., *Barefoot v. Estelle*, — U.S. —, 51 U.S.L.W. 5189 (July 6, 1983); *United States v. Ptasynski*, 51 U.S.L.W. 4674 (June 6, 1983); and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). More specifically, WLF joined 25 State Attorneys General and appeared before this Court in *Illinois v. Gates*, 51 U.S.L.W. 4708 (June 8, 1983) arguing for a good faith exception to the exclusionary rule.

In the instant case, the Washington Legal Foundation seeks to advance the interests of its members and the general public by urging the Court to reverse the decision of the Supreme Court of New Jersey in *State in the interest of T.L.O.*, 94 N.J. 331, 463 A.2d 934 (1983). The New Jersey Supreme Court's ruling applies the exclusionary rule as fashioned by this Court in *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 252

U.S. 393 (1914), to a search of a student conducted by a public school administrator during regular school hours. In so doing, the lower court ignores the narrow and prudent limitations this Court has placed on the rule through its prior decisions and impermissibly broadens the judicially created procedural safeguard in such a way as to harm the public interest.

The Washington Legal Foundation can bring to this case a perspective not presently represented by the parties in interest which will assist this Court in obtaining full consideration of the public interest issues involved. Accordingly, the Foundation respectfully requests permission to file the annexed brief *amicus curiae*.

Respectfully submitted,

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DATED: January 12, 1984

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Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

**BRIEF OF *AMICUS CURIAE*
THE WASHINGTON LEGAL FOUNDATION**

**INTEREST OF *AMICUS CURIAE*
THE WASHINGTON LEGAL FOUNDATION**

The interests of the Washington Legal Foundation in this case are set forth in the foregoing motion for leave to file a brief *amicus curiae*.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* adopts the statement of the case provided in Petitioner's brief.

SUMMARY OF ARGUMENT

The Supreme Court of New Jersey erroneously extended the application of the exclusionary rule, a procedural safeguard fashioned by this Court, *Mapp v. Ohio*,

367 U.S. 643 (1961); *Weeks v. United States*, 252 U.S. 383 (1914), to searches of students conducted by public school officials during regular school hours. The rule's application in this context is beyond the scope of the rule's remedial objectives, i.e., deterring police conduct, and harmful to the public interest in maintaining a drug-free learning environment in this nation's public schools.

ARGUMENT

I. THE APPLICATION OF THE EXCLUSIONARY RULE TO A SEARCH CONDUCTED BY A PUBLIC SCHOOL ADMINISTRATOR IS BEYOND THE SCOPE OF THE RULE'S REMEDIAL OBJECTIVES AND HARMFUL TO THE PUBLIC INTEREST.

In the landmark case of *Mapp v. Ohio*, 367 U.S. 643 (1961), this Court applied to the states a rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment principally upon the belief that the exclusion would deter future unlawful police conduct. In more recent decisions, this Court has reiterated that the primary justification for the exclusionary rule is the deterrence of conduct by law enforcement officers that violates a Fourth Amendment right. *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Janis*, 428 U.S. 433, 446 (1976); *United States v. Calandra*, 414 U.S. 338, 347-348 (1974). In these decisions, this Court has taken pains to point out that the rule is *not* a constitutional right, but rather a "remedial device", the application of which must be restricted to those areas where its objective, i.e., deterring the unconstitutional activity of law enforcement officers, is most efficaciously served.

To paraphrase a seminal article quoted favorably by this Court in *Stone v. Powell*, *amicus curiae* submits that granted, while so many criminals must go free in order to deter the constables from blundering, the pursuance of this policy beyond necessity inflicts gratuitous harm on

society. 428 U.S. at 487 (quoting Amsterdam, *Search, Seizure and Section 2225: A Comment*, 112 U. Pa. L. Rev. 378, 388-389 (1964)). The Supreme Court of New Jersey, by applying the rule to searches by public school administrators, recklessly ignored this Court's narrow application of the rule and harmed the public interest in maintaining a drug-free learning environment in our public schools.

A. The Application of the Rule Should be Narrowly Restricted to the Illegal Activity of Law Enforcement Officers.

This Court has stated and emphasized that the principal, if not sole, justification for the exclusionary rule is the deterrence of *police conduct* that violates a Fourth Amendment right. 428 U.S. at 486. In the historic *Mapp* decision, this Court characterized the rule as a "deterrent safeguard" against unlawful seizures by *law enforcement officers*. 367 U.S. at 648. Since *Mapp*, this Court has applied the rule exclusively to searches conducted by law enforcement officers.

In the instant case, the New Jersey Supreme Court has extended the rule to allow the criminal to go free "because the teacher has blundered." Yet this Court has never ruled that the Constitution demands the exclusion of evidence acquired through a search by a public school administrator completely devoid of any police involvement. The rule was designed to be applied to and designed to deter activity like the warrantless search by police officers in the *Mapp* case. Refusing to tolerate these "shortcut methods in law enforcement" was the motive of this Court in fashioning the rule. This Court saw the application of the rule in this context as correct not only because of the constitutional imperative but because the rule made good sense. 367 U.S. at 657.

The application of the exclusionary rule to school administrators, however, makes little sense whatsoever.

Public school officials have no connection with law enforcement. Their objectives are not to arrest and bring to trial persons who have broken the law, but to enforce school rules and regulations to promote a healthy and safe environment of learning. The objective of the assistant vice-principal in the present case was not to secure an arrest, but to enforce the school rules regulating cigarette smoking. By necessity, this interest in fostering a healthy educational environment sometimes entails regulating activity that is criminal in nature, *e.g.*, vandalism, assaults on teachers and students and the like. Be that as it may, it was never the intent of this Court to apply the exclusionary rule to persons other than law enforcement officers, and this Court should reject Respondent's suggestion to do so.

In his famous dissent, Chief Justice Burger in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), stated:

Freeing either a tiger or a mouse in a schoolroom is an illegal act, but no rational person would suggest that these two acts should be punished in the same way. . . . I submit that society has at least as much right to expect rationally graded responses from judges in place of the universal "capital punishment" we inflict on all evidence when police error is shown in its acquisition.

Id. at 419. The Supreme Court of New Jersey let a "tiger loose in the schoolroom" by inflicting "capital punishment" on the courtroom use of illegal drugs found by a school administrator. *Amicus* contends that society has the right to expect that the exclusionary rule, a deadly procedural bar to the conviction of admittedly guilty individuals, will be *narrowly* tailored by the courts to apply only when the *Mapp* goals, are furthered, *i.e.*, deterring dishonest and unconstitutional methods of law enforcement.

B. The Potential Benefit of Applying the Rule to School Searches is Outweighed by the Potential Harm to the Public Schools and the Public Interest.

In *Stone v. Powell*, this Court emphasized that the policies behind the exclusionary rule are not absolute, but must instead be evaluated in light of competing policies. 428 U.S. at 488. Courts should employ a pragmatic analysis of the exclusionary rule's usefulness in a particular context and ask whether the benefits of applying the rule outweigh the costs society must bear by requiring the evidence to be excluded.

Therefore, the issue in the instant case is not whether students are entitled to the minimum protections of the Constitution or whether the Fourteenth Amendment as now applied to the states protects students against unconstitutional actions by public school administrators.¹ Rather, the issue is whether the potential benefits of extending the application of the exclusionary rule to regulatory conduct by public school administrators outweigh the potential injury to the role and functions of public school administrators and society in general.

In *Stone*, this Court examined the issue of whether state prisoners may invoke an exclusionary rule claim after fair and final consideration of the claim at the state level on Federal habeas corpus review. This Court declined to apply the rule in this instance since it believed that law enforcement officers would not be deterred from committing Fourth Amendment violations out of fear that Federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal.

¹ Respondent's reliance on *Tinker v. Des Moines, etc. School District*, 393 U.S. 503 (1969), is misplaced in the present context. *Amicus* acknowledges that students are "persons" under our Constitution and are possessed of fundamental rights which the state must respect. *Id.* at 509. This is not the issue in the present case. The issue is whether, using a pragmatic analysis, the application of the exclusionary rule to school searches is useful.

Id. at 493. Any incremental deterrent effect that would be produced by allowing this kind of collateral review would be outweighed by the acknowledged costs to other values vital to a rational system of criminal justice. *Id.* at 494.

Similarly, the same practice of limiting the application of the rule in situations where the costs to society far outweigh any incremental deterrent effect produced by the application of the rule can be found in this Court's standing cases. For example, in *Rakas v. Illinois*, 439 U.S. 128, 134 (1978), this Court refused to apply the exclusionary rule to the benefit of defendants whose Fourth Amendment rights had not been violated. *See also United States v. Payner*, 447 U.S. 727, 735 (1980), in which the majority of this Court refused to allow the suppression of otherwise admissible evidence which had been seized unlawfully from a third party not before this Court. This Court emphasized that the interest of deterring illegal searches would not be served by exclusion of the evidence at the "instance of a party who was not the victim of the challenged practices." *Id.*

In a similar vein, this Court has not seen fit to apply the exclusionary rule in the context of impeachment of a defendant's testimony at trial. In *United States v. Havens*, 446 U.S. 620, 628 (1980), this Court held that the rule's interest in police deterrence was outweighed by society's interest in reaching the truth at trial, and this Court allowed the prosecution to impeach the defendant's testimony with illegally obtained evidence which was inadmissible in the government's direct case. *See also Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971); and *Walder v. United States*, 347 U.S. 62 (1954).

Also, the exclusionary rule has not been applied in Federal civil proceedings even though the evidence was seized in violation of the Constitution. In *United States v. Janis*, 428 U.S. 433, 455, Justice Blackmun wrote that

there was no justification for extending the exclusionary rule to a Federal civil proceeding based upon evidence unlawfully seized by a law enforcement officer who had acted in good faith:

In short, we conclude that exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion. This Court, therefore, is not justified in so extending the exclusionary rule. (Footnote omitted.)

Similarly, the rule has not been applied to grand jury proceedings. *United States v. Calandra*, 414 U.S. 338. The Court noted that any possible "minimal advance in the deterrence of police misconduct" was outweighed by society's interest in not hampering the role of the grand jury. *Id.* at 352.

In the instant case, the potential costs to society's interest in maintaining a safe and intellectually stimulating public school system are obvious and great. The primary concern of public school administrators is, not surprisingly, the education of America's youth and the enforcement of school rules to see that this education can take place in a proper and conducive environment. The public school is not an arm of the criminal justice system and should be allowed to pursue its educative functions without being strapped by the innumerable procedural restrictions of a police investigation or a criminal trial.² This Court has consistently reinforced this view by emphasizing in a number of cases that judicial interposition in the operation of the public school system of this country requires particular care and restraint. *See Board of Curators of the University of Missouri v. Horo-*

² This is buttressed in New Jersey by statutes giving school administrators broad authority to maintain order, safety and discipline. N.J. STAT. ANN. Section 18A-25-2 (West 1968).

witz, 435 U.S. 78 (1978); *Ingraham v. Wright*, 430 U.S. 651 (1977).

Recent statistics on the scope of the drug and alcohol problem in the public schools provide grim evidence of the problems of drug abuse school administrators face today. *Weekly Reader*, a children's magazine distributed in the public schools, surveyed over 500,000 children in 1980 on drug and alcohol use among their peers. About one-third of the students in grades 4-8 believed that drinking alcohol is "A big problem" among children their own age, and about 40 per cent said the same about drugs. In both cases the percentages rose among high school students. WEEKLY READER PERIODICALS, A STUDY OF CHILDREN'S ATTITUDES AND PERCEPTIONS ABOUT DRUGS AND ALCOHOL (1980).

The National Institution on Drug Abuse's 1982 survey on student drug use, the sixth in an annual series reporting the drug use and related attitudes of high school seniors in the United States, reports that roughly two-thirds of all American young people (64%) try an illicit drug before they finish high school. Over one-third have illicitly used drugs other than marijuana. At least one in every sixteen high school seniors is actively smoking marijuana on a daily basis, and 20% have done so for at least a month at some time in their lives. About one in sixteen is drinking alcohol daily; and 41% have had five or more drinks in a row at least once in the past two weeks. Much of the activity takes place during school hours and on school premises. These alarming statistics reflect the highest levels of illicit drug use to be found in any nation in the industrialized world. L. JOHNSTON, J. BACHMAN, P. O'MALLEY, National Institute on Drug Abuse's STUDENT DRUG ABUSE ATTITUDES AND BELIEFS 14 (1982).

A report by the New Jersey Department of Education stated that between July 1, 1979 and June 30, 1981, New Jersey districts reported 21,721 incidents of violence,

vandalism, drug abuse, or some combination of the three. NEW JERSEY DEPARTMENT OF EDUCATION, FINAL REPORT ON THE STATEWIDE ASSESSMENT OF INCIDENTS OF VIOLENCE, VANDALISM AND DRUG ABUSE IN THE PUBLIC SCHOOLS 2, 4, 5 (July, 1982). The report went on to urge local school boards to:

actively assist students and staff by assuring a safe atmosphere, free from danger and disruption and one which promotes a positive environment conducive to learning. Disruptive behavior constrains the learning process and lowers school morale at all levels. A discipline policy must hold students accountable and consequently apply remedial and preventive steps that will ensure the safety and promote the education of all pupils.

Id. at 59. This discipline policy, vital towards ensuring that students have a right to pursue their academic endeavors without exposure to dangers or overwhelming distraction, requires that school administrators have broad supervisory powers. Excluding drugs, weapons, and other incriminating evidence at a juvenile's delinquency hearing because the juvenile's teacher or vice-principal did not comply with the meticulous and ever-changing requirements of the Fourth Amendment as pronounced by appellate judges can only undermine that discipline policy needed more than ever in today's schools to ensure a healthy learning environment.

In contrast to the overwhelming and blatant costs that are potentially lurking as a result of the New Jersey Supreme Court's opinion, any incremental deterrent effect which might be achieved by extending the rule to apply to school administrators is uncertain at best. There is already considerable opinion that little deterrence of police misconduct results from the exclusion of illegally seized evidence from criminal trials.³ It is even less

³ Chief Justice Burger, in his dissenting opinion in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,

plausible that any deterrence of misconduct by school administrators will result from the exclusion of illegally seized evidence at a juvenile's criminal proceeding.

The Chief Justice has acknowledged that policemen do not have the time, inclination, or training to grasp the nuances of the appellate opinions that ultimately define the procedural standards of conduct they are to follow in investigating a crime, *Bivens*, 403 U.S. at 447.⁴ *Amicus* asks how possibly can teachers and school administrators, concerned primarily with the education of the Nation's youth and not with law enforcement acquire and maintain working knowledge of search and seizure procedure. School officials have little knowledge or interest in criminal proceedings and are likely not to comprehend why evidence seized by them in the course of their administrative duties is later suppressed at a juvenile criminal proceeding.

The fact that the application of the rule in this context will have little or no deterrent effect on the actions of school administrators is reinforced by the remoteness of the seizure and the criminal proceeding. School administrators are not only insulated from the actual exclusion

403 U.S. 388, stated flatly that "... there is no empirical evidence to support the claim that the rule deters illegal conduct of police officers." *Id.* at 416. There is, however, some empirical evidence of non-deterrence of police "misconduct" by the exclusionary rule; see: Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 Journal of Legal Studies 243 (1973); see, generally: Wilkey (Malcolm R., Judge, United States Court of Appeals for the District of Columbia Circuit), *The Exclusionary Rule: Should the Criminal Go Free Because the Constable Has Blundered?* 62 Judicature, 5, 215 (November 1978). Judge Wilkey also points out that no other nation in the free world has engrafted the exclusionary rule onto its criminal justice system; *id.* at 216.

⁴ Illustrated recently in *Robbins v. California*, 453 U.S. 420 (1981) where a total of 14 judges reviewed a search, 7 finding it invalid and 7 finding it valid.

decision (as are police officers) but also from the entire criminal proceeding. The purpose of deterrence is defeated because the school administrator may never even learn the outcome of the proceeding.

Finally, criminal prosecution is wholly unrelated to the duties of a public school administrator. He or she is mainly concerned with enforcing the school rules to ensure the safety of the students and maintain a healthy educative environment. The assistant vice-principal that discovered the drugs in the purse of Respondent arguably would not have been deterred by the exclusion of the evidence in the later criminal proceeding, since his main goal in implementing the search was the enforcement of the school's no-smoking regulation. Endorsing the Supreme Court of New Jersey's reckless extension of the exclusionary rule would merely confuse school administrators and ultimately disrupt disciplinary measures needed to maintain a proper learning environment.

CONCLUSION

For all of the reasons stated above, the Washington Legal Foundation submits that the ruling of the court below must be reversed.

Respectfully submitted,

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January 12, 1984

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No. 83-72

IN THE
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October Term, 1983

State of New Jersey,
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v.

T.L.O., a Juvenile,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

MOTION FOR LEAVE TO FILE A BRIEF
AS AMICUS CURIAE

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State of New Jersey,
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T.L.O., a Juvenile,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY.

MOTION FOR LEAVE TO FILE A
BRIEF AS AMICUS CURIAE

The New Jersey School Boards

Association has moved the Court for leave
to appear as amicus curiae herein for the
purposes of filing the attached brief.

Consent to file this brief has been
obtained in writing from Lois DeJulio,
First Assistant Deputy Public Defender,
State of New Jersey and telephone consent
initially was believed to be received from
the Attorney General. (Affidavits

attached).

Respectfully submitted,

Paula A. Mullaly

Paula A. Mullaly
General Counsel to
New Jersey School
Boards Association

Thomas F. Scully

Thomas F. Scully
Assistant Counsel to
New Jersey School
Boards Association

No. 83-72

IN THE
Supreme Court of the United States
October Term, 1983

State of New Jersey,
Petitioners,

v.

T.L.O., a Juvenile,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

MEMORANDUM OF THE NEW JERSEY
SCHOOL BOARDS ASSOCIATION IN
SUPPORT OF MOTION FOR LEAVE
TO FILE BRIEF AS
AMICUS CURIAE

The New Jersey School Boards
Association has moved this Court for leave
to appear as amicus curiae herein for the
purposes of filing the attached brief.
While consent was received from the Public
Defender Appellate Section, the Association
was unable to receive formal consent from
the Attorney General, although initial
phone conversations indicated such

was forthcoming.

Amicus curiae, New Jersey School Boards Association, is a statutory, nonprofit organization, comprised of approximately 600 Boards of Education in the State of New Jersey. N.J.S.A. 18A:6-45. The bylaws of the Association cite as major objectives to encourage and aid all movements for the improvement of educational affairs of the state and the betterment and welfare of the children. The issue before this Court impacts dramatically on individual boards of education and their employees and students. Resolution of the issues before this Court will dictate the actions which any board of education and its agents may take in efforts to maintain discipline and safety within the schools of their district. It is, therefore, imperative that the New Jersey School Boards Association participate in this case and effectively argue on behalf of their

membership.

The applicability of the exclusionary rule and the standards to which school officials must conform in the maintaining schools are the issues this Court has elected to address. The New Jersey School Boards Association has adopted the following policy with respect to these issues:

The New Jersey School Boards Association recognizes that public school students have the constitutional right to be free from unreasonable searches and seizures by any person acting in an official capacity on behalf of a local school district. It is believed to be best for all parties concerned if the search of a student by a school official were permissible, only where the official had a reasonable suspicion that a school rule or a state law was being violated.

With this policy position as a base, amicus will urge the Court to take a novel approach to the exclusionary rule controversy, and in so doing properly balance the competing interests at stake in this matter.

No. 83-72

IN THE
Supreme Court of the United States
October Term, 1983

State of New Jersey,
Petitioners,

v.

T.L.O., a Juvenile,
Respondent.

AFFIDAVIT

STATE OF NEW JERSEY,
COUNTY OF MERCER SS.

Thomas F. Scully, of full age being
duly sworn according to law upon his oath
deposes and says:

1. I am Assistant Counsel to the New
Jersey School Boards Association
[hereinafter the Association], a non-profit
corporation created by the New Jersey
Legislature, pursuant to N.J.S.A. 18A:6-45
et seq.

2. On January 18, 1983, the New
Jersey Supreme Court granted the

Association's motion to participate as amicus curiae, solely by the filing of a brief, In the Matter of T.L.O.

3. On August 8, 1983, the New Jersey Supreme Court issued its ruling in said case. This holding represents an adoption of the position argued by the Association.


4. The Association requests the consent of the parties for leave to participate in New Jersey v. T.L.O., No. 83-712, as amicus curiae.

5. On Thursday, December 8, 1983, the Office of the New Jersey Public Defender informed me by telephone that they would consent to the Association's participation as amicus curiae in said case. On December 12, 1983 the Association received written confirmation of this consent. (Appendix C).

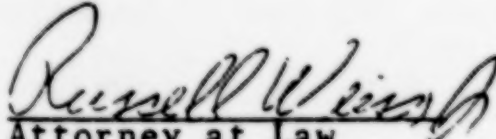
6. On Monday, December 12, 1983, pursuant to a telephone conversation I had with Alan J. Nodes, Deputy Attorney General, attorney for the petitioner, it was

my understanding that consent would be granted and I was instructed to provide Mr. Nodes with a consent form for the Association to participate as amicus curiae.

7. On Tuesday, December 20, 1983 I was advised by Mr. Nodes in a telephone conversation that we would receive a written statement on the Attorney General's response to our request. This response has not yet been received.


Thomas F. Scully
New Jersey School
Boards
Association

Sworn and
Subscribed to
before me
this 6th day
of January,
1984.


Attorney at Law
State of New Jersey

No. 83-72

IN THE
Supreme Court of the United States
October Term, 1983

State of New Jersey,
Petitioners,

v.

T.L.O., a Juvenile,
Respondent.

AFFIDAVIT

STATE OF NEW JERSEY,
COUNTY OF MERCER SS.

Paula A. Mullaly, of full age being
duly sworn according to law, upon her oath
deposes and says:

1. I am the Assistant Executive
Director/General Counsel to the New Jersey
School Boards Association, [hereinafter the
Association], a non-profit corporation
created by the New Jersey Legislature,
pursuant to N.J.S.A. 18A:6-45 et seq.

2. All district boards of education
in the State are compelled to be members of

the Association. The Association is charged with the duty to "encourage and aid all movements for the improvement of the educational affairs of th[e] State."

N.J.S.A. 18A:6-47.

3. The Association is governed by a Board of Directors, duly elected by its membership, as set forth in the Bylaws of the New Jersey School Boards Association, Article VII. (Appendix A). On September 10, 1982, the Board of Directors adopted a policy on school searches, which states:

The NJSBA recognizes that public school students have the constitutional right to be free from unreasonable searches and seizures by any person acting in an official capacity on behalf of a local school district. The Association believes that it is best for all parties concerned if a search of a student by a school official is conducted only where the official has a reasonable suspicion that a school rule or state law is being violated.
(File Code 5142.12)

4. On January 18, 1983, the New Jersey Supreme Court granted the

Association's motion to participate as amicus curiae, solely by the filing of a brief, In the Matter of T.L.O. (Appendix B).

5. On August 8, 1983, the New Jersey Supreme Court issued its ruling in said case, holding that school district personnel may conduct student searches whenever there is a "reasonable suspicion" that illegal substances or activities are present. In so holding, the Court adopted the position argued by the Association.

6. Pursuant to this Court's granting of the State of New Jersey's petition for certiorari, and R.36 of the United States Supreme Court Rule, I requested consent from the parties for leave to participate in New Jersey v. T.L.O., No. 83-712, as amicus curiae.

7. On Thursday December 8, 1983, the office of the New Jersey Public Defender granted its consent in a telephone

conversation between Lois A. DeJulio, Esq., attorney for respondent, and Thomas F. Scully, Esq., Assistant Counsel, New Jersey School Boards Association, for the Association's participation as amicus curiae in the said case. On December 12, 1983 the Association received written confirmation of this consent. (Appendix C).

8. On Monday, December 12, 1983, pursuant to a telephone conversation between Alan J. Nodes, Deputy Attorney General, attorney for petitioner, and Thomas F. Scully, Esq., Assistant Counsel, New Jersey School Boards Association it was my understanding that the Attorney General's Office had consented to the Association's participation as amicus curiae in the said case.

9. On Friday, December 16, 1983, pursuant to a telephone conversation between myself and Victoria Curtis Bramson, Deputy Attorney General, attorney for the

petitioner, I was advised that the Attorney General's office would not grant their consent to the Association's participation as amicus curiae in the said case. In the course of that conversation, I was advised that consent was being withheld due to the Association's differing position from that of the State regarding the application of the exclusionary rule.

10. On December , 1983 the Association received written notice from Irwin I. Kimmelman, Attorney General of New Jersey, that the State was withholding its consent for the Association's participation as amicus curiae in that the matter was an issue of police enforcement and that the Association had no interest in the said case. (Appendix D).

11. The Association is bringing the within motion for leave to participate as amicus curiae before this Court based upon the firm belief that the decision rendered

in this matter will impact on school operations throughout the United States and more specifically, directly impact upon the operation and policies of the members of the New Jersey School Boards Association.

Paula A. Mullaly
Paula A. Mullaly
New Jersey School
Boards
Association

Sworn and
Subscribed to
before me
this 6th day
of December,
1983.

Donald W. Wier, Jr.
Attorney at Law
State of New Jersey

No. 83-72

IN THE
Supreme Court of the United States
October Term, 1983

State of New Jersey,
Petitioners,

v.

T.L.O., a Juvenile,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

AMICUS CURIAE BRIEF OF THE NEW
JERSEY SCHOOL BOARDS ASSOCIATION

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PROCEDURAL HISTORY

On March 7, 1980 a complaint (JD-1322-80) was filed in Middlesex County Court alleging that juvenile T.L.O. possessed marijuana with intent to distribute, in violation of N.J.S.A. 24:21-19(a)(1) and N.J.S.A. 24:21-20(a)(4). Pursuant to published disciplinary procedures, Piscataway High School administratively suspended T.L.O. for ten days.

T.L.O., by her parents, filed a motion in Superior Court, Chancery Division, to show cause why T.L.O. should not be reinstated in school prior to the hearing on the juvenile delinquency complaint.

On March 23, 1980, the Chancery Division upheld the suspension for smoking cigarettes, however vacated the suspension which had been imposed for possession of marijuana. The Court found that the evidence obtained in the warrantless search of the purse was obtained in violation of

T.L.O.'s rights under the Fourth and Fourteenth Amendments to the United States Constitution.

On September 26, 1980 the Middlesex County Juvenile and Domestic Relations Court denied motions to dismiss the complaint and suppress all evidence obtained as a result of the search. The issue involving the suppression of the evidence was relitigated and the search was determined by the Juvenile and Domestic Relations Court to be proper. State in the Interest of T.L.O., 178 N.J. Super. 329, 342-345 (J.D.R. 1980).

On June 18, 1980 a complaint (JD-2717-80) was filed in the Middlesex County Court charging T.L.O. with larceny of under \$220.00 from the residence of Rosemarie Cole.

On December 22, 1980 a complaint (JD-83-81) was filed in Middlesex County Court charging T.L.O. with possession of

less than 25 grams of marijuana on school property.

On March 21, 1980, T.L.O. was prosecuted under the original complaint before Judge Nicola, Presiding Judge of the Middlesex County Juvenile and Domestic Relations Court. She was found guilty of possession of marijuana with the intent to distribute.

On June 2, 1981, T.L.O. entered pleas of guilty to all charges contained in complaints JD-83-81 and JD-2717-80.

On January 8, 1982, Judge Nicola imposed a probationary term of one year upon the condition that T.L.O. observe a reasonable curfew, attend school regularly and successfully complete a counseling and drug therapy program.

On February 11, 1982 a Notice of Appeal from the final adjudication of delinquency was filed in the State of New Jersey, Superior Court, Appellate Division. The

Appellate Division affirmed the denial of the motion to suppress, remanded the matter for further proceedings regarding the sufficiency of the Miranda waiver and vacated the final adjudication of delinquency entered on January 7, 1982 and remanded the matter for further proceedings.

On July 16, 1982, T.L.O. filed a notice of appeal to the New Jersey State Supreme Court as a matter of right, based on Judge Joelson's dissent at the Appellate Division level.

On January 27, 1983, the New Jersey Supreme Court granted the New Jersey School Boards Association's motion for leave to file a brief and argue amicus curiae.

On August 8, 1983, the Supreme Court of the State of New Jersey reversed the lower courts and suppressed all evidence obtained in the search of T.L.O.'s purse.

STATEMENT OF FACTS

On the morning of March 7, 1980, a Piscataway High School teacher observed T.L.O., a juvenile, and a girl named Johnson holding what appeared to be lit cigarettes in the girl's lavatory. The teacher escorted the girls to the assistant vice principal's office and accused the girls of violating the school's no-smoking regulations. The assistant vice principal asked the girls whether they had, in fact, been smoking cigarettes. Miss Johnson admitted to smoking and was assigned to attend the school smoking clinic for three days pursuant to school disciplinary policy. T.L.O. adamantly denied smoking. The assistant vice principal instructed T.L.O. to go into a private office rather than punishing her. Once inside the office he requested to see the student's purse. Upon opening it, he observed a pack of Marlboro cigarettes. After admonishing

T.L.O. for lying to him, he removed the cigarettes from the purse and observed cigarette rolling papers. Based on his experience he determined that the rolling papers were used in connection with marijuana smoking. A further inspection of the purse revealed marijuana, a metal pipe, a list of people owing T.L.O. money and forty single dollars and ninety-eight cents. A letter from T.L.O. to a friend requesting her to sell marijuana in school.

The assistant vice principal telephoned T.L.O.'s mother and summoned the police. After a conversation at the school, T.L.O. and her mother, at the request of police, went to police headquarters, where after being advised of her rights, T.L.O. admitted to selling marijuana in school. She told the police that she had sold 18 to 20 marijuana cigarettes at school that morning at the price of \$1.00 per marijuana cigarette.

T.L.O. was suspended for three days for smoking cigarettes on school property in an undesignated area. She was suspended an additional seven days for possession of marijuana. The police officer who questioned her drafted a complaint charging the juvenile with possession of marijuana with intent to distribute.

AMICUS CURIAE BRIEF OF THE
NEW JERSEY SCHOOL BOARDS
ASSOCIATION

INTEREST OF AMICUS CURIAE

Amicus curiae, New Jersey School Boards Association, is a statutory, nonprofit organization, comprised of approximately 600 Boards of Education in the State of New Jersey. N.J.S.A. 18A:6-45. The bylaws of the Association cite as major objectives the encouragement of and aid to all movements for the improvement of educational affairs of the state and the betterment and welfare of the children. The issue before this Court impacts dramatically on individual boards of education and their employees and students. Resolution of the issues before

this Court will dictate the actions which any board of education and its agents may take in efforts to maintain discipline and safety within the schools of their district. It is, therefore, imperative that the New Jersey School Boards Association participate in this case and effectively argue on behalf of its membership.

ISSUE PRESENTED FOR REVIEW

THE EXCLUSIONARY RULE IS
INAPPLICABLE TO SEARCHES CONDUCTED
BY SCHOOL OFFICIALS IN GOOD FAITH.

The applicability of the exclusionary rule and the standards to which school officials must conform in maintaining safety and discipline in the schools are the issues this Court has elected to address. The New Jersey School Boards Association has adopted the following policy with respect to these issues:

The New Jersey School Boards
Association recognizes that public
school students have the

constitutional right to be free from unreasonable searches and seizures by any person acting in an official capacity on behalf of a local school district. It is believed to be best for all parties concerned if the search of a student by a school official were permissible only where the official had a reasonable suspicion that a school rule or a state law was being violated.

-3-

With this policy position as a base, amicus will urge the Court to take a novel approach to the exclusionary rule controversy, and in so doing properly balance the competing interests at stake in this matter.

In determining the applicability of the Exclusionary Rule to student searches, a preliminary examination of the constitutional rights of students is necessary. The Fourth Amendment was designed to protect persons against unreasonable searches by government officials, both federal and state. Mapp v. Ohio, 367 U.S. 643 (1961). The

protections, however, do not extend to searches conducted by private citizens. Bardeau v. McDowell, 256 U.S. 465 (1921).

This Court has clearly held that children are persons for the purposes of exercising First Amendment Rights. Tinker v. Des Moines School District, 343 U.S. 583 (1969). If children are entitled to all the First Amendment rights that adults enjoy, it necessarily follows that they are entitled to the same Fourth Amendment rights. There is no reasonable distinction which can be drawn between the rights of citizens to free speech and the right to be free from unreasonable searches.

While the status of school officials as government officials has been a recurrent issue before the courts, existing case law in the State of New Jersey clearly identifies them as such for constitutional purposes. Durgin v. Brown, 37 N.J. 189 (1962); State in the Interest of G.C., 121

N.J. Super. 188 (J.D.R. 1972) Numerous state and federal courts have reached the same conclusion. Tinker v. Des Moines School District, supra, State v. Baccino, 282 A.2d 869 (Del. Super. 971). The New Jersey State Legislature has similarly recognized school officials as government officials by empowering them with the authority to maintain an orderly, disruption-free atmosphere in which students may receive their legislatively-mandated right to a thorough and efficient education. N.J. Constitution, 1947, Article 8, Sec. , par. 1; N.J.S.A. 18A:26-2; N.J.S.A. 18A:38-31.

The New Jersey Supreme Court below properly determined that students possess Fourth Amendment protections as they relate to searches conducted by school officials. State in Interest of T.L.O. 94 N.J. 331 (1983). Moreover, the court correctly distinguished between the standard to be

applied to police officers when determining the reasonableness of search and that which must be applied to a school official.

Accordingly, it developed a less stringent standard than the probable cause standard necessary to legitimize searches conducted by police officers. The Court in *T.L.O.*, in identifying this standard, held:

We are satisfied that when a school official has reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order, the school official has the right to conduct a reasonable search for such evidence."

T.L.O., supra, at 346.

Amicus urges this Court to adopt a similar approach in determining a standard of reasonableness and to recognize the inherent difference between the role of a police officer and that of a school official. Unlike school officials, police officers are provided with substantial training in the procedure for search and

seizure prior to serving on a police force. This knowledge and understanding is reinforced and refined during the course of the officer's career because of his continuing need to deal objectively with crime. It is, therefore, only sensible to impose a strict standard of reasonableness for searches conducted by police officers. The motivations and mechanisms to provide and maintain training necessary to uphold this strict standard are already in place. But perhaps even more importantly, the very precept that assures a free society dictates substantial protection from abuse of the power we must necessarily place in the hands of police officers.

A standard lower than probable cause for police searches would delete the concept of reasonableness so much as to emasculate the Fourth Amendment. Weeks v. U.S., 232 U.S. 383 at 344.

The status of school officials as

government officials subject to the proscriptions of the Fourth Amendment must not be misconstrued so as to make them analogous to police officers. School officials, as professional educators, receive none of the training in the legal technicalities of search and seizure that law enforcement officers must master. It is unreasonable to expect teachers and administrators to undertake such training. Although in some schools criminal activity may take place on a regular basis, investigation of crime is not the basic role of school officials. While a single administrator may be responsible for discipline in a school, that individual is nothing more than an experienced educator who has received administrative training. A concern for crime is simply not a part of the fabric of a teacher or administrator. To interject formal training in constitutional theory pertaining to police

searches would confound rather than enlighten school officials as to how to deal with actual incidents.

It is quite obvious that school officials and police officers serve very different functions in our society. The primary function of a school official is to educate within an environment conducive to learning. In recognition of this important role and in order to permit school officials to function freely and properly, the courts have consistently conferred upon them the special status of standing in loco parentis to students. State in Interest of G.C., 121 N.J. Super. 188; State v. Baccino, supra. Only by partially functioning in the role of a parent can school officials maintain the order necessary for a proper educational environment. N.J.S.A. 18A:37-1 to 5; N.J.S.A. 18A:38-31; N.J.S.A. 18A:26-2. Hence, too strict a standard of

reasonableness would serve to hinder a school official from carrying out his primary role of educating students. This is not to say that the constitutional rights of students can be lightly dismissed. A delicate balance between the competing interests of students and school officials must be struck ultimately. Clearly, in order to properly maintain the educational environment, individual freedoms must give way at some point to the well-being of the student body as a whole.

The "reasonable grounds" standard articulated by the New Jersey Supreme Court properly weighs the constitutional rights of students against the legislatively mandated responsibility of administrators to act in such a fashion as to maintain discipline and order within schools. While school officials cannot run roughshod over student's rights, there is no reason to prevent an official from conducting a

search for the safety of all students when there are reasonable grounds to do so.

Amicus is compelled to assert that while application of the exclusionary rule seems to logically flow from the application of the Fourth Amendment in the view of the New Jersey Supreme Court, the Court may have overlooked again the need to distinguish between the role of school officials and that of police officers.

The exclusionary rule was not designed to address the conduct of school officials acting with the good faith belief that illegal activity was in progress. The rule from its inception was designed to deter law enforcement officials from violating the constitutional rights of citizens in the administration of justice.

In sum the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than the personal constitutional rights of the aggrieved. United States v. Calandra, 414 U.S. 348.

Over 70 years ago this Court clearly identified deterrence as a major priority.

The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which resulted in their embodiment in the fundamental law of the land. Weeks, supra, at 344.

The potential for over-zealous actions of police officers is thwarted by excluding illegally seized evidence at trial.

Excluding evidence obtained by a school official at trial clearly does not serve a similar purpose.

Application of the same logic to searches conducted by school officials does not result in the same deterrence. Police officers are charged with a higher level of awareness of the constitutional rights of individuals and the ramifications of violating such protections. It is, therefore, imperative to provide this

deterrent mechanism with respect to police conduct. The same rationale cannot be applied to school officials. The roles of police officers and school officials are totally dissimilar. Police officers are sworn to fight crime and protect the public from criminals. The role of a school official as it relates to crime is limited. A school official has little or no concern for ferreting out crime other than for the purpose of maintaining a safe environment for students. Police officers deal specifically with the Fourth Amendment rights of individuals much more frequently than school officials.

The primary concern of school officials in obtaining evidence of illegal conduct on the part of students is to protect the student body as a whole. It is submitted that school officials must be afforded a greater degree of flexibility than the police officer in conducting searches.

necessary to protect the school environment. If school officials are held to the same standards as police officers, the orderly and safe environment necessary to providing students a thorough and efficient education may be in jeopardy.

Amicus suggests that a balance must be struck with respect to the conduct of school officials. The exclusionary rule is clearly applicable where it can be shown that it has a deterrent effect. In the school search context, deterrence is possible only where the search was conducted in bad faith. The exclusionary rule serves the purpose for which it was created when applied to searches conducted arbitrarily and in bad faith, and should deter school officials from engaging in constitutionally impermissible conduct in the future.

However, when a school official has a good faith belief that illegal activity is

present, application of the exclusionary rule will often frustrate the ultimate goal to preserve an orderly and safe environment for the student body. A deterrent effect on good faith searches conducted by school officials is clearly not desirable.

Applying the exclusionary rule to a good faith effort on the part of school officials would, in fact, have no deterrent effect. A school official would more than likely not be aware of the defect in the search and therefore exclusion of evidence obtained would not effect future conduct. Application of the rule, on the other hand, might have the ultimate deterrent effect whereby the school officials would be afraid to take any action no matter how reasonable. Neither of these results serves the purpose of the Fourth Amendment.

The Courts have long recognized the significance of a "good faith" belief on the part of government officials in

determining the admissibility of evidence seized under questionable circumstances. United States v. Pettier, 422 U.S. 531 (1975); United States v. Janis, 428 U.S. 433 (1976). In Janis this Court refused to apply the exclusionary rule to a federal civil tax proceeding where evidence was obtained through the execution of a defective warrant. The Court found that the government official had not acted in an illegal fashion and had relied on a good faith belief that the warrant was legally sound. A similar good faith belief on the part of government officials has served in the past to cure otherwise improper searches. In Wood v. Strickland, 450 U.S. 308 (1975) this Court addressed the issue of good faith on the part of an official as a defense in an action where a party claimed the official violated his rights under U.S.C.A. § 1983. The Court held that the defense of good faith immunity would be

defeated only if the official knew or should have reasonably known that the action he took within his sphere of responsibility would violated the rights of the plaintiff. The Court additionally pointed out that such a good faith defense would be unavailable if the government official "maliciously intended" to cause a deprivation of constitutional rights.

Amicus urges this Court to adopt the same rationale to searches conducted by school officials. Where school officials act in blatant disregard of the constitutional rights of students, this Court has no alternative other than to exclude any evidence obtained as a result of this misconduct.

A variation of the facts of T.L.O. can demonstrate the utility of the good faith standard. The facts in T.L.O. indicate that she vehemently denied smoking. The vice-principal thereafter, acting in good

faith in searching her purse, should not be subjected to the strict application of the exclusionary rule. If the facts of this case were changed to indicate that she freely admitted to smoking cigarettes any search thereafter must be deemed to have been conducted in bad faith. Such a bad faith action on the part of a school official would clearly dictate strict application of the exclusionary rule. In this situation the exclusionary rule would provide the deterrent effect for which it was designed.

In Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982) this Court again addressed the issue of imposing a good faith standard upon government officials as a prerequisite of granting them immunity for unintentional, unlawful conduct. The Court in Harlow reiterated:

Our decisions consistently have held that government officials are entitled to some form of immunity

from suits for damages. As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling acts of liability. Harlow, supra, at 2732.

The Court in Harlow recognized the need to provide flexibility for government officials and dealt with the potentially disabling threat of liability being imposed by allowing for a 'good faith defense. It is clear, however, if the actions taken by the official are blatantly in bad faith, this defense will not be available and the official is exposed to any liability naturally resultant from his actions. The same rationale the Court has utilized to protect government officials from liability should be applied to school officials conducting searches. If school officials must operate under the strict application of the exclusionary rule, they will be substantially disabled in their efforts to execute their duties as educators and to

protect the safety and well-being of students. It can hardly be argued that a school official would be unreasonable to search a locker where there is a substantial likelihood that a bomb is present and a good deal of evidence supports that belief. Given these facts the resultant search would certainly be in good faith. This Court must recognize the necessity of providing school officials with this defense, however, or school officials will be paralyzed by the application of rule that simply was not designed to address the good faith conduct of school officials. If school officials cannot rely on their concept of the term "reasonable", they will lose control of the schools and the student body. Some measure of flexibility must be provided to avoid the result.

Amicus respectfully submits that a good faith standard can be effectively imposed

upon school officials in their efforts to operate schools in an orderly and safe fashion. The purpose and spirit of the exclusionary rule and the integrity of the Fourth Amendment remain intact by providing school officials with the flexibility they must have in order to operate schools and provide a thorough and efficient education for children. Allowing this good faith exception to the exclusionary rule as it relates to school officials in no way results in a diminution of the deterrent purpose for which it was created.

CONCLUSION

The New Jersey School Boards Association, in keeping with its adopted policy and consistent with its by-laws, implores this Court to recognize the necessity of providing school officials with a mechanism to control the operation of the public schools. It is respectfully submitted that the exclusionary rule should

not be applied where school officials have acted in good faith, for the reasons and arguments set forth above.

Respectfully submitted,

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(4)
No. 83-712

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CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY,

Petitioner,

-VS-

T.L.O., a Juvenile,

Respondent.

**ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY**

BRIEF FOR PETITIONER

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BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Whether the Fourth Amendment's exclusionary rule applies to searches made by public school officials and teachers in school.

PARTIES TO THE PROCEEDING BELOW

In addition to the captioned parties, the parties before the New Jersey Supreme Court included Jeffrey Engerud, a defendant now deceased, and, as *amici curiae*, the New Jersey School Boards Association and the American Civil Liberties Union of New Jersey.

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No. 83-712

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

STATE OF NEW JERSEY,

Petitioner,

vs.

T.L.O., a Juvenile,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

BRIEF FOR PETITIONER

OPINIONS BELOW

State in the Interest of T.L.O., 178 N.J. Super. 329, 428 A.2d 1327 (J.D.R.C. 1980), *aff'd o.b. in part and rev'd o.g. in part*, 185 N.J. Super. 279, 448 A.2d 493 (App. Div. 1982), *rev'd*, 94 N.J. 331, 463 A.2d 934 (1983).

JURISDICTION

The judgment of the New Jersey Supreme Court which is at issue in this matter was entered on August 8, 1983, and a petition for *certiorari* was timely filed on October 7, 1983. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1257(3), with *certiorari* to the Supreme Court of New Jersey having been granted on November 28, 1983.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and No Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

N.J. Stat. Ann. 24:21-19 (West 1940 & Supp. 1983). Prohibited Acts

A. Manufacturing, distributing, or dispensing - Penalties

a. Except as authorized by this act, it shall be unlawful for any person knowingly or intentionally:

(1) To manufacture, distribute, or dispense, or to possess or have under his control with intent to manufacture, distribute, or dispense, a controlled dangerous substance;

N.J. Stat. Ann. 24:21-20 (West 1940 & Supp. 1983). Prohibited Acts

B. Possession, use or being under influence - Penalties

a. It is unlawful for any person, knowingly or intentionally, to obtain, or to possess, actually or constructively, a controlled dangerous substance unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this act. Any person who violates this section with respect to: . . .

(4) Possession of more than 25 grams of marijuana, including any adulterants or dilutants, or more than 5 grams of hashish is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 5 years, a fine of not more than \$15,000.00 or both; provided, however, that any person who violates this section with respect to 25 grams or less of marijuana, including any adulterants or dilutants, or 5 grams or less of hashish is a disorderly person.

STATEMENT OF THE CASE

On the morning of March 7, 1980, a teacher of mathematics at Piscataway High School entered the girls restroom and found the juvenile-respondent T.L.O. and a girl named Johnson holding what the teacher perceived to be lit cigarettes. (MT20-1 to 25).¹ Smoking was not permitted and the girls were thus committing an infraction of the school rules. The girls were taken to the principal's office where they met with Theodore Choplick, the assistant vice-principal. (MT21-1 to 3; MT21-24 to 22-11; MT31-18 to 20; MT33-20 to 34-10).

Mr. Choplick asked the two girls whether they were smoking. Miss Johnson acknowledged that she had been smoking, and Mr. Choplick imposed three days attendance at a smoking clinic as punishment. (T49-24 to 50-7). T.L.O. denied smoking in the lavatory and further asserted that she did not smoke at all. (MT27-10 to 17). Mr. Choplick asked T.L.O. to come into a private office. (MT27-14 to 21; MT30-22 to 31-17).

Once inside this office, Mr. Choplick requested the juvenile's purse, and she gave it to him. (MT27-24 to 28-7). A package of Marlboro cigarettes was visible inside the purse. (MT28-9 to 11). Mr. Choplick held up the Marlboros and said to the juvenile, "You lied to me." (MT28-14 to 18). In plain view next to the Marlboros was a package of "Easy Roll" rolling papers for cigarettes. (MT28-19 to 24; T16-12 to 14). Upon being confronted with the rolling papers, the juvenile denied that they belonged to her. (MT29-5 to 24).

On the basis of his experience, Mr. Choplick understood possession of rolling papers to indicate that a person is smoking marijuana and looked further into the purse. There he found marijuana, drug paraphernalia, \$40 in one-dollar bills and documentation of T.L.O.'s sale of marijuana to other students. (MT29-7 to 9; T15-18 to 16-1; T41-5 to 13). Mr. Choplick called T.L.O.'s mother and then notified the police. (MT41-5 to 13).

1 "MT" refers to the transcript of the motion to suppress heard before the Juvenile and Domestic Relations Court on September 26, 1980;

"T" refers to the transcript of trial on March 23, 1981, the transcript of the juvenile's plea of guilty to other complaints on June 2, 1981, and the transcript of sentencing on January 8, 1982, all contained in one volume.

T.L.O.'s mother acceded to a police request to bring her daughter to police headquarters for questioning. (T18-12 to 18). Once at headquarters, T.L.O. was advised of her rights in her mother's presence and signed a *Miranda*² rights card so indicating. (T20-3 to 21). The officer then began to question T.L.O. in her mother's presence. (T23-4 to 6). T.L.O. admitted that the objects found in her purse belonged to her. She further admitted that she was selling marijuana in school, receiving \$1 per "joint," or rolled marijuana cigarette. T.L.O. stated that she sold between 18 and 20 joints at school that very morning, before the drug was confiscated by the assistant vice-principal. (T22-2 to 15). A delinquency complaint charging the juvenile with possession of marijuana with the intent to distribute, contrary to *N.J. Stat. Ann. 24:21-19(a)(1)* (*West 1940 & Supp. 1983*) and *N.J. Stat. Ann. 24:21-20(a)(4)* (*West 1940 & Supp. 1983*), was then drafted and filed the same day. Because the offense occurred on school property, the school, in accordance with its published procedures, administratively suspended the juvenile for ten days.

On September 26, 1980, the trial court considered and denied the juvenile's motion to suppress evidence. *State in the Interest of T.L.O.*, 178 N.J. Super. 329, 336-343, 428 A.2d 1327, 1330-1334 (J.D.R.C. 1980), *aff'd o.b. in part and rev'd o.g. in part*, 185 N.J. Super. 279, 448 A.2d 493 (App. Div. 1982), *rev'd* 94 N.J. 331, 463 A.2d 934 (1983). On March 23, 1981, the juvenile was tried and, at the conclusion of trial, she was found guilty and adjudicated delinquent. (T69-6 to 8). On January 8, 1982, T.L.O. was sentenced to probation for one year with the special condition that she observe a reasonable curfew, attend school regularly and successfully complete a counselling and drug therapy program.

On February 11, 1982, the juvenile filed a Notice of Appeal to the Superior Court of New Jersey, Appellate Division. On June 30, 1982, the Appellate Division, with one judge dissenting, affirmed the denial of the motion to suppress evidence seized in the search of the juvenile's purse, for the reasons expressed in the trial court's reported opinion. 185 N.J. Super. 279, 448 A.2d 493.

On July 16, 1982, the juvenile filed a Notice of Appeal to the Supreme Court of New Jersey. On August 8, 1983, the State Supreme

Court held that the Fourth Amendment exclusionary rule applies to searches and seizures conducted by school officials of students in public schools. 94 N.J. 331, 463 A.2d 934.

In that same opinion, the New Jersey Supreme Court applied the same principle in the companion case of *State v. Engerud*, involving a search of a high school student's locker pursuant to information that the student was selling controlled dangerous substances in the school. Shortly after the date of the decision, the defendant Engerud was killed in a motorcycle accident, thus mootng any petition in that case.

2 *Miranda v. Arizona*, 384 U.S. 436 (1966).

SUMMARY OF ARGUMENT

The exclusionary rule should not be applied to a search of a student or his or her belongings by a public school official in the pursuit of a school disciplinary objective. Because a school official's main concern is education, he is not primarily interested in whether a conviction is later obtained as a result of his disciplinary activities. He conducts searches too infrequently to adapt his methods to highly technical rules and, therefore, application of the exclusionary rule would have no rational bearing on deterring any improper searches by such official. Any incremental deterrent effect on the school official of suppression in a later criminal proceeding would be far outweighed by the detrimental effect upon society occasioned by the suppression of probative evidence of criminality in the school system. Indeed, assuming *arguendo* that exclusion of evidence could deter unreasonable searches by school officials, application of the exclusionary rule would exact too great a societal cost by impairing the school authorities' capability of enforcing school discipline.

LEGAL ARGUMENT

THE FOURTH AMENDMENT EXCLUSIONARY RULE SHOULD NOT BE APPLIED TO SEARCHES CONDUCTED BY PUBLIC SCHOOL OFFICIALS IN SCHOOL.

This case comes before the Court as a result of a school official opening a schoolgirl's purse and finding marijuana, drug paraphernalia, cash and other evidence documenting the girl's sale of drugs to her classmates. The evidence was turned over to police and thereafter used in a juvenile delinquency proceeding. While the trial court and intermediate state appellate court found the search of the purse to be reasonable, the Supreme Court of New Jersey ruled the search unreasonable under the Fourth Amendment and, applying the exclusionary rule, suppressed the evidence obtained in the search. Petitioner, the State of New Jersey, urges this Court to hold that the exclusionary rule is inapplicable to exclude evidence discovered in searches conducted by public school officials in school pursuant to their obligation to maintain school discipline.

While the Fourth Amendment proscribes unreasonable searches conducted by government agents, the exclusionary rule is not coextensive with violations of that amendment and is designed to reach only actions by law enforcement officials. Indeed, application of the exclusionary rule has never been sanctioned by this Court in any context other than as a remedy against unconstitutional searches and seizures by law enforcement officers. The first step in any analysis is to recognize this distinction between the Fourth Amendment and the associated exclusionary rule. The Fourth Amendment proscribes all unreasonable searches conducted by government agents; operation of the exclusionary rule as a remedy for Fourth Amendment violations is limited to those unreasonable searches conducted by law enforcement officers.

Logic, public policy and the history of the Fourth Amendment exclusionary rule all militate against application of this sanction against

those who, like school authorities, are not directly involved in law enforcement.³ The purpose of the exclusionary rule is to deter unlawful conduct on the part of law enforcement authorities by not allowing those involved in law enforcement to benefit from the fruits of such conduct. For those officials, such as school personnel, who are not involved in law enforcement nor charged with that responsibility, however, the exclusion from a criminal proceeding of evidence will have little meaning. Thus, the exclusionary rule can have little or no deterrent impact upon their actions. A brief review of the development of the Fourth Amendment exclusionary rule will clearly demonstrate that the purpose of the rule is the deterrence of unlawful conduct and that the rule is intended to be invoked solely against law enforcement officials.

This Court first considered application of an exclusionary rule to remedy Fourth Amendment violations in *Adams v. New York*, 192 U.S. 585 (1904).⁴ In *Adams*, federal law enforcement officers unlawfully seized papers of the defendant which documented his participation in illegal lotteries. *Id.* at 587-589. The defendant objected to the introduction of this evidence at his trial on the basis that the officers had exceeded the scope of the warrant. *Id.* at 587. This Court noted that the Fourth Amendment was intended to prevent violations of citizens' privacy "by officers of the law" and to remedy such violations, *id.* at 598, and opined that law enforcement officers conducting an illegal search "would be responsible for the wrong done." *Id.* at 595. The Court then ruled that, regardless of the constitutionality of the underlying search, the evidence seized was legally competent under the rules of evidence and its admission was therefore justified. *Id.* at 595-596.

3 It could be argued that the Fourth Amendment itself is inapplicable to school authorities. This precise holding has been reached by some states. See *In re Donaldson*, 269 Cal.App.2d 509, 75 Cal.Rptr. 220 (Ct. App. 1969); *People v. Stewart*, 63 Misc.2d 601, 313 N.Y.S.2d 253 (N.Y. Crim. Ct. 1970); *Commonwealth v. Dingfelt*, 227 Super. 380, 323 A.2d 145 (Pa. Super. Ct. 1974); *Mercer v. State*, 450 S.W.2d 715 (Tex. Ct. Civ. App. 1970).

4 Previously, in a quasi-criminal tax forfeiture case, the Court had prohibited the government from compelling a defendant to produce documentary evidence necessary for proof of the government's case, but had justified that suppression under the Fifth Amendment's privilege against self-incrimination. *Boyd v. United States*, 116 U.S. 616 (1886).

In the case of *Weeks v. United States*, 232 U.S. 383 (1914), this Court formulated the precursor to the present exclusionary rule. In *Weeks*, as in its predecessor *Adams*, the Court was confronted with a Fourth Amendment violation by federal law enforcement officers. The *Weeks* Court admonished that "[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions" would not be tolerated. Thus, this Court ruled that, because inculpatory personal papers had been confiscated in violation of defendant's Fourth Amendment rights, the papers should have been returned to defendant on his motion prior to trial, and not used as evidence at trial. *Id.* at 398. The sanctions required by *Weeks* were obviously intended for purposes of deterrence and were directed solely to the conduct of federal law enforcement authorities who had violated the Fourth Amendment in their attempts to obtain material for use in criminal prosecutions.

This reasoning, that limitations on the use of unconstitutionally seized evidence could deter law enforcement officers from violating the Fourth Amendment, was further developed in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). In that case, Department of Justice officials and the United States marshal obtained corporate records using a method which was conceded by all parties to be in violation of the United States Constitution. Upon defendant's demand and the trial court's order, the government returned the original documents it had seized, but retained copies. The government then used the knowledge obtained from the illegal seizure to subpoena the original documents. *Id.* at 390-391. This Court ruled that law enforcement authorities could make no use of the unconstitutionally seized evidence or the knowledge gained from the unconstitutional seizure of evidence. *Id.* at 392.

The following year, this Court ruled that in certain circumstances a defendant could assert a violation of his Fourth Amendment rights and move for the return of property during, rather than only before, a criminal trial. *Amos v. United States*, 255 U.S. 313 (1921); *Gould v. United States*, 255 U.S. 298 (1921). Shortly thereafter, when faced with a case in which the defendant could not move for the return of property without incriminating himself, this Court decided that illegally seized contraband could be suppressed even absent a motion for return of the property. *Agnello v. United States*, 269 U.S. 20, 34 (1925). It was still clear, however, that the exclusionary

rule was intended only to deter abuses by federal law enforcement authorities. *Byars v. United States*, 273 U.S. 28 (1927). Although the rule was later expanded to prohibit the federal use of evidence illegally seized by state authorities and turned over to federal authorities, *Elkins v. United States*, 364 U.S. 206, 222-224 (1960); see *Benanti v. United States*, 355 U.S. 96, 102 (1957); *Lustig v. United States*, 338 U.S. 74, 79 (1949), and thereafter extended *in toto* to the states, *Mapp v. Ohio*, 367 U.S. 643 (1961), the primary focus of the rule has remained the deterrence of unconstitutional searches performed by law enforcement officials.

Admittedly, this Court has recognized, at various times, "the imperative of judicial integrity" as a second possible justification for the exclusionary rule. Under that rationale, the judiciary would become "accomplices" in illegality by admitting evidence derived from the unconstitutional actions of law enforcement officers. *Lee v. Florida*, 392 U.S. 378, 385-386 (1968); *McNabb v. United States*, 318 U.S. 332, 345 (1943). Indeed, in *Elkins v. United States*, *supra*, the Court seemed to rely equally on deterrence and judicial integrity. Nevertheless, despite these temporary diversions, the single enduring reason for the existence of the exclusionary rule has been the deterrence of illegal searches by law enforcement officers.⁵ Therefore, in *Mapp v. Ohio*, *supra*, this Court, in requiring the states to apply the Fourth Amendment exclusionary rule, noted that the government must teach obedience to law by its own example, but placed primary emphasis on the deterrent effect of the rule. 367 U.S. at 655-656, 659. The scope to be afforded the imperative of judicial integrity was seemingly limited in *United States v. Peltier*, 422 U.S. 531 (1975), in which the Court held that the imperative was not offended by use of evidence derived from the good faith actions of law enforcement officers, even if the officers were later deemed to have

acted unconstitutionally. *Id.* at 536-538. Finally, the vitality of this doctrine was seriously eroded by *Stone v. Powell*, 428 U.S. 465 (1976), where this Court stated:

While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence.... The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights. [*Id.* at 485-486].⁶

One cannot fail to note the irony in justifying the suppression of evidence in order to achieve judicial integrity. Indeed, when illegally seized evidence is suppressed, it is recognized that the integrity of the truth-finding process itself is thereby impaired. See *United States v. Havens*, 446 U.S. 620, 626 (1980).

It is thus clear that the historic reason for the exclusionary rule was the deterrence of unlawful searches and seizures by law enforcement authorities. This theme has been stressed repeatedly, and although other justifications for the rule have been advanced, all but deterrence have been discarded. In this regard, it is indeed worthy of note that this Court has never held that illegal searches by private individuals come within the ambit of the rule. *Burdeau v. McDowell*, 256 U.S. 465 (1921); see *Walter v. United States*, 447 U.S. 649 (1980). Moreover, in those few instances where searches by persons such as officers of administrative agencies have been held subject to the rule, it has been clear that these agents were involved primarily in a public safety function which required their acting to enforce laws and regulations having consequences which were, at the least, quasi-criminal. See, e.g., *Michigan v. Tyler*, 436 U.S. 499 (1978) (search of fire-damaged premises by police or fire officials to investigate cause of fire); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (searches of work areas by Occupational Safety and Health Administration investigators); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (warrantless search of premises by investigators for San Francisco Department of Public Health).

6 It should also be noted that Justice Stewart, one of the strongest advocates of the imperative of judicial integrity, has recently written that it was never his intention to imply that this doctrine provided a constitutional basis for the rule. Stewart, "The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases," 83 Colum L. Rev. 1365, 1382 n.2 (1983).

5 On occasion, this Court has observed that the exclusionary rule serves an educational purpose because it encourages law enforcement officers to learn to limit searches and seizures to those constitutionally permissible. See *Elkins v. United States*, 364 U.S. at 220-222. This purpose is, however, interconnected with the deterrent purpose of the rule. Indeed, it has been suggested that, if a jurisdiction developed a system of educating law enforcement agents coupled with an administrative system of disciplining those individuals or agencies failing to comply with the mandates of the Federal Constitution, a rule which requires invariable exclusion of illegally seized evidence would have no purpose. Goodparten, "An Essay on Ending the Exclusionary Rule," 33 Hastings L.J. 1065, 1107-1108 (1982).

Additionally, this Court recently, in *United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579 (1982), again emphasized that the purpose of the rule is to deter illegal police conduct. *Id.* at _____, 102 S.Ct. at 2592-2594. Indeed, both the majority and those Justices who dissented agreed that the rule was understood to act "as a deterrent to unconstitutional police conduct."⁷ *Id.* at _____, 102 S.Ct. at 2595; see *id.* at _____, 102 S.Ct. at 2593-2594. It has thus remained unmistakably clear that exclusion of unlawfully seized evidence has been and continues to be required only if the exclusion would serve to deter unlawful conduct by law enforcement officers. We strongly urge that it is against this standard that searches by school teachers and administrators must be measured.

In evaluating the need for a deterrent sanction, it is first necessary to identify those who are to be deterred. The instant matter concerns a search undertaken by school officials for a purely disciplinary purpose in which evidence of criminality was uncovered. The question is whether such evidence may be admitted in a subsequent criminal proceeding. It must be remembered that such school officials are not charged with enforcement of the criminal law. Rather, they seek to educate children and, in so doing, strive only to maintain an institutional environment conducive to such instruction. In their pursuit of this goal, school authorities may indeed uncover evidence of crime, but consideration of whether such evidence can or cannot be used by a different authority in a wholly different context "falls outside the offending [school official's] zone of primary interest." See *United States v. Janis*, 428 U.S. 433, 458 (1976) (evidence obtained by a state criminal law enforcement officer in good faith reliance on a warrant which later proved to be defective, while inadmissible in the state court, is admissible in a federal civil tax proceeding). Under such circumstances, the suppression of the evidence in a subsequent criminal trial would not "provide significant, much less substantial, additional deterrence," *id.*; application of the exclusionary rule to searches performed by school officials is, therefore, wholly unjustified.

It cannot be emphasized too strongly that the obligation of school administrators is not to enforce the criminal law, but to provide quality education to all children. See, e.g., *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 29-30 (1973). When, under a system

of compulsory public education, parents must entrust their children to the public schools, parents have a right to expect that the schools will, to the best of their ability, protect the students and insulate them from harmful influences while pursuing the school's primary mission of educating them. While education remains the primary concern of school authorities, when the state assembles large numbers of young people in schools, it incurs a duty to protect them from being harmed. This duty of the school authorities to maintain "a proper educational environment," 3 *W. LaFare, Search and Seizure* § 10.11 at 458 (1978), carries with it a concomitant right of the students to pursue educational endeavors without exposure to danger or undue disruption.

It is, of course, painfully obvious that educators cannot properly discharge their duty to educate students if they are forced to function in an environment in which drugs and weapons play a major part.⁸ When drugs and weapons are commonplace in the school environment, the inevitable result is a crippling of our educational system. Because protecting students is directly related to the educational process, it is essential that school administrators have broad supervisory and disciplinary powers. Indeed, as this Court has recognized, children in attendance at public schools occupy a different constitutional position from that enjoyed by adult citizens. For, while adults have an absolute right to security from physical menaces or assaults, "the State itself may impose such corporal punishment as is reasonably necessary 'for the proper education of the child and for the maintenance of group discipline.'" *Ingraham v. Wright*, 430 U.S. 651, 661-662 (1977), citing 1 *F. Harper & F. James, Law of Torts* § 3.20 at 292 (1956). In *Ingraham*, this Court refused to formulate a rule of procedural due process governing corporal punishment in schools because such action "would significantly burden the use of corporal punishment as a disciplinary measure." 430 U.S. at 680.

8 According to national statistics, 22,759 persons under age 18, the school-age population, were arrested for weapons offenses in 1982; 76,208 children under age 18 were arrested for drug abuse violations in that same year. *Crime in the United States*, Uniform Crime Reports, 1982, Federal Bureau of Investigation, Table 34, at 182. During 1982, approximately ten percent of the nation-wide number of weapons arrests of children under age 15 occurred in New Jersey, far more than this State's proportionate share based on population. *Crime in New Jersey*, Uniform Crime Report, 1982, Division of the State Police, State of New Jersey.

7 It is noted that the dissent also referred to the traditional value of judicial integrity as noted in *United States v. Peltier*, 442 U.S. 531.

As discussed above, the exclusionary rule is justified because it is viewed as a deterrent to future unlawful police conduct. There is nothing sacrosanct about the exclusionary rule; it is not embedded in the Constitution, nor is it a personal right. It is now well-established that "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved" by an unlawful search. *United States v. Calandra*, 414 U.S. 338, 348 (1974). And, as with any remedial device, its application is restricted to those areas where its remedial objectives are "most efficaciously served." *Id.* Hence, it is clear that suppression of evidence is not a right conferred by the Fourth Amendment but, rather, is a remedy designed to effectuate those rights. Stewart, "The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases," 83 *Colum. L. Rev.* 1365, 1390 (1983).

In the case of a search of a student by school officials, the deterrent objective cannot be achieved and the rule must be deemed inapplicable. Even where a search is conducted by law enforcement officers, the rule is not automatically applied; rather, in determining whether to apply the rule, the benefits of deterrence are weighed against the substantial detriment to society and the truth-finding process inherent in excluding relevant evidence of criminality. *United States v. Calandra*, 414 U.S. at 347; see *United States v. Ceccolini*, 435 U.S. 268 (1978). Evidence should be excluded only where the benefit accruing to society from the additional deterrent to unlawful police practices equals or exceeds the detriment to society caused by the release of criminals. Accordingly, this Court has refused to rule "that anything which deters illegal searches is thereby commanded by the Fourth Amendment." *Alderman v. United States*, 394 U.S. 165, 174-175 (1969).

The opinions of this Court concerning the suppression remedy have recognized the serious consequences of suppression of probative and relevant evidence of crime. Indeed, in recent years the continuing vitality of the exclusionary rule has been questioned by members of this Court. See, e.g., *Illinois v. Gates*, ___ U.S. ___, 103 S.Ct. 2317, 2340-2344 (1983) (White, J., concurring); *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.*, 403 U.S. 388, 412-424 (1971) (Burger, J., dissenting). Hence, the Court has articulated a balancing test for determining the application of the exclusionary rule.

Unless the benefits of extending the rule to actions by school officials attempting to maintain school discipline outweigh "further encroachment upon the public interest" (*Alderman v. United States*, 394 U.S. at 175) by derogation of the truth-finding process in criminal prosecutions, this Court should decline to further extend the exclusionary rule. Where its deterrent purposes will not be served, there is no justification for the rule. See *Desist v. United States*, 394 U.S. 244, 254 n.24 (1969).

In balancing the possible deterrent benefits of applying the exclusionary rule against its cost to society in the context of public school searches, it is manifest that the balance weighs heavily against excluding evidence.⁹ Indeed, it has been argued that exclusion can be an effective deterrent only if two conditions are met: (1) the searcher must have a strong interest in obtaining convictions, and (2) the searcher must conduct searches and seizures regularly in order to be familiar enough with the rules to adapt his methods to conform to them. *Note*, 19 *Stan. L. Rev.* 608, 614-615 (1967). Neither condition can be met in the case of a public school official. The assistant vice-principal in this case had no interest in obtaining a criminal conviction. Indeed, the object of his search was evidence of a school disciplinary infraction wholly unrelated to any criminal prosecution. The possibility of suppression in a subsequent criminal proceeding, had it occurred to the assistant vice-principal, would not have deterred him from enforcing the school's rules, which was his primary concern.

In this regard, the incentive for school officials to search, occasioned by their educational responsibilities, could not be effectively lessened by the suppression of evidence at a subsequent criminal trial. School officials have a duty to enforce school regulations, to safeguard students during school hours and to maintain a drug-free learning environment. Under the circumstances of this case, the vice-principal should undoubtedly have followed the same course of conduct in his attempt to enforce the school's non-smoking regulations regardless

⁹ In the case of a student processed through the juvenile court system, there is an additional cost to applying the exclusionary rule. The primary purpose of juvenile delinquency proceedings is to rehabilitate rather than punish the youthful offender. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 539 (1971); *Kent v. United States*, 383 U.S. 541, 554-555 (1966). Where evidence is suppressed in a juvenile proceeding, the injury to the truth-finding process is exacerbated by frustration of this ameliorative purpose and the juvenile, as well as society, is injured.

of his consideration, or knowledge, that any "evidence" seized would not be used later in a court of law.

Furthermore, school authorities conduct searches infrequently, and even less frequently come in contact with the criminal justice system. They are charged with the duty of education, not law enforcement. Hence, their interest in the law of search and seizure is tangential at best. There is little reasonable possibility that a school official would learn the law governing searches and seizures and be able to conform his conduct accordingly. The facts of this case demonstrate this principle quite plainly. The vice-principal, considering the juvenile's ready compliance with his request to hand over her purse, might well have concluded that she consented to the search. Under the standard developed for law enforcement officers by the New Jersey courts in *State v. Johnson*, 68 N.J. 349, 346 A.2d 66 (1975), however, the consent would be invalid because the juvenile was not specifically informed of her right to refuse permission to search. It is unreasonable to require principals, teachers and others not involved in law enforcement to familiarize themselves with complex legal principles which give lawyers and judges pause, and then apply these principles to emergent factual situations.

It could be argued that allowing law enforcement officers to make use of evidence obtained by other public officials who are not involved in law enforcement would reintroduce the long-discarded "silver platter" doctrine. *Lustig v. United States*, 338 U.S. at 79. This is incorrect. The "silver platter" doctrine arose at a time when the exclusionary rule was not yet applicable to the states. Federal law enforcement authorities who conducted illegal searches were able to turn the improperly seized evidence over to the states "on a silver platter" for use in state criminal trials. See *Elkins v. United States*, *supra*. The silver platter doctrine was discarded for a variety of reasons, none of which is applicable to the school situation. First, in *Elkins v. United States*, *supra*, Justice Stewart noted that cooperative law enforcement efforts between state and federal authorities were to be commended and encouraged and that allowing the doctrine to continue under these circumstances would provide an "inducement to subterfuge and evasion." 364 U.S. at 222. See also *United States v. Peltier*, 422 U.S. at 537-539. Because school authorities do not become involved in law enforcement investigations, no such temptation exists. If, of course, a school official acts on behalf of law enforcement officers in a particular case, the courts

are free to suppress the evidence thereby obtained, because it would then be clear that the school authorities would, in fact, be acting as agents of the law enforcement authorities.

A second reason for disallowing the silver platter doctrine was the imperative of judicial integrity. *Elkins v. United States*, 364 U.S. at 222-223. However, this "imperative" has itself been called into question. It is well to argue that the Court should not involve itself in any way in an action violative of the federal Constitution, *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting), but it must also be remembered that by mandating exclusion, the Court requires that the factfinder be presented with a distorted picture of the case and, in a sense, perpetrates a fraud upon the factfinder. See *Stone v. Powell*, 428 U.S. at 485. Additionally, it must be remembered that in many situations use of unconstitutionally seized evidence is permitted. See, e.g., *United States v. Havens*, *supra* (defendant may be impeached by evidence illegally obtained); *Rakas v. Illinois*, 439 U.S. 128 (1978) (standing limitations on who may object to the introduction of unconstitutionally seized evidence); *United States v. Calandra*, *supra* (illegally seized evidence may be used in grand jury proceedings); *Henry v. Mississippi*, 379 U.S. 443 (1965) (counsel's deliberate bypassing of contemporaneous objection to tainted evidence in state court constitutes waiver of federal claim of constitutional violation); *Frisbie v. Collins*, 342 U.S. 519 (1952) (power of a court to try a person for a crime is not impaired by the fact he was brought within the court's jurisdiction by forcible abduction). Thus, this doctrine would provide no support for insertion of the exclusionary rule into the school search situation.

As this Court observed in *United States v. Janis*, *supra*, "[t]here comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches" of government. 428 U.S. at 459. Supervision of school officials who conduct searches of their students must properly be the primary obligation of a department of government other than the judicial branch. Congress has provided persons aggrieved by unreasonable searches with legal redress in the form of a 1983¹⁰ action for damages, and many state legislatures have provided similar civil damages remedies. Moreover, school administrators, faced with the specter of unreasonable searches by school

10 42 U.S.C. § 1983.

personnel, may choose to enact internal disciplinary measures. In any event, use of the exclusionary rule as a judicial remedy for unreasonable school searches cannot achieve the purpose of general, or even specific, deterrence and is therefore unwarranted.

Since the exclusionary rule was made applicable to the states in *Mapp v. Ohio*, *supra*, police have been educated in the correct methods of performing searches and their knowledge may have deterred the performance of some unlawful searches. The impetus for police instruction in the constitutional niceties of search and seizure law has been the local prosecutors' offices, which have found their own law enforcement functions to be inhibited by the suppression of probative evidence resulting from unconstitutional police searches. Because police and prosecutors share the common occupational objective of enforcement of the criminal laws and constantly interact to achieve their objective, police officers have an incentive to become aware of the constitutional constraints on their investigative abilities. This same motivation is wholly absent on the part of school officials who do not in the normal course collaborate with prosecutors and do not function to enforce the law. Indeed, teachers have no professional incentive to follow stringent procedures otherwise correct for law enforcement officers, because they would have little interest in either developing a cooperative relationship with the prosecutors or in convicting their students of crimes.

The facts of the present case illustrate the lack of justification for extending the exclusionary rule to a school search. A teacher observed a group of girls in a restroom and identified T.L.O. and another girl as smoking cigarettes, a prohibited activity. The assistant vice-principal could have punished T.L.O. based solely upon the teacher's observation. T.L.O., however, disputed the accuracy of the teacher's perception and not only denied smoking at that time, but denied that she smoked at all. T.L.O.'s denial sharply contrasted with the immediate admission of T.L.O.'s companion. This second girl acknowledged smoking and, without further investigation, the vice-principal required her to attend a smoking clinic as punishment. Faced with T.L.O.'s absolute denial and the second girl's admission, the school official had no practical alternative but to take the reasonable step of requesting and opening T.L.O.'s purse. If no cigarettes had been found, it is probable that T.L.O. would have received only a warning.

In enforcing school discipline, it is prudent to leave educators with choices unrestricted by considerations of evidentiary questions. A teacher concerned with preserving possible evidence would be hard-pressed to administer or enforce the school's own regulations. Concern with application of the exclusionary rule could have a chilling effect on proper inquiries into minor school infractions. Such inquiries are often necessary to maintain discipline in schools. Indeed, the New Jersey Supreme Court appeared to recognize the necessity for such school disciplinary investigations when it stated:

We do not disparage the school officials' actions in these cases. They must often, as here, act on short notice based on the information they possess.... The issue here is not criticism of their actions.... [*State in the Interest of T.L.O.*, 94 N.J. at 349, 463 A.2d at 943].

The New Jersey Supreme Court thus appeared to recognize that the actions of the school officials were contextually reasonable. But without further justification, that court went on to apply the exclusionary rule despite the fact that there was no possibility that its deterrent purpose could be achieved.

Thus, as demonstrated by the foregoing arguments, application of the exclusionary rule to school searches would be costly and ineffective. By definition, the suppression of evidence impedes the search for truth and frustrates achievement of that goal. To do so under the facts of the present case, moreover, would impose a stiff societal cost. In attempting to maintain discipline by enforcing the school's non-smoking regulation, a vice-principal, in an action "not disparaged" by the state court, opened a student's purse and found evidence that the girl was selling drugs to other students. Although the girl was guilty of using the schoolhouse to dispense drugs, the evidence of the girl's crime was suppressed and she returned undeterred to the classroom. The detrimental result of this action on public education cannot be overestimated. If school authorities are unable to take effective action to enforce discipline and provide a crime-free environment for learning, then the primary purpose of the public school, that is, universal education, will not be achieved. The incalculable loss falls upon the well-intentioned pupils and their innocent parents.

In sum, balanced against the cost, there is little or no benefit to be gained by application of the exclusionary rule. The primary value

of the exclusionary rule, deterrence, is not present, for school officials acting in the course of their employment have little or no interest in criminal proceedings and are not likely to know whether or why evidence they have discovered has been suppressed. Because it is unlikely that the future conduct of school officials can be "corrected" or deterred by application of the exclusionary rule, there exists no reason to extend the rule to the school search situation. Thus, application of the exclusionary rule to searches performed by school authorities is without practical benefit or justification.

CONCLUSION

For the foregoing reasons, the State of New Jersey urges this Court to rule that the exclusionary rule is inapplicable to school searches performed by school administrators and teachers and to reverse the decision of the New Jersey Supreme Court suppressing evidence.

Respectfully submitted,

s/I.I.K.

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Dated: January 14, 1984

JAN 16 1984

ALEXANDER L. STEVAS.

CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY,

Petitioner,

-VS-

T.L.O., a Juvenile,

Respondent.

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JOINT APPENDIX

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CERTIORARI GRANTED NOVEMBER 28, 1983

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RELEVANT DATES OF IMPORTANCE

Juvenile and Domestic Relations Court, Middlesex County, New Jersey:

March 7, 1980 - Juvenile Delinquency Complaint No. JD 1322-80 filed in the matter of *State in the Interest of T.L.O.*

September 26, 1980 - Denial of Juvenile's motion to dismiss Complaint No. JD 1322-80 in the matter of *State in the Interest of T.L.O.*

March 23, 1981 - Trial held and Adjudication of Delinquency entered in *State in the Interest of T.L.O.*

January 8, 1982 - Sentencing of juvenile held in *State in the Interest of T.L.O.*

Superior Court of New Jersey, Appellate Division:

February 11, 1982 - Juvenile's Notice of Appeal filed in the matter of *State in the Interest of T.L.O.*

June 30, 1982 - Affirmance of adjudication of delinquency, with one judge dissenting.

Supreme Court of New Jersey:

July 16, 1982 - Juvenile's Notice of Appeal filed in the matter of *State in the Interest of T.L.O.*

August 8, 1983 - Reversal of judgment of Appellate Division in the matter of *State in the Interest of T.L.O.*

DECISION IN QUESTION

The State of New Jersey notes that all decisions in the New Jersey courts were both published and appear in the appendix to the petition for *certiorari* and are therefore not reprinted herein. Specifically, petitioner directs this Court's attention to:

APPENDIX A

State in the Interest of T.L.O., 94 N.J. 331, 463 A.2d 934 (1983). Opinion of the Supreme Court of New Jersey, decided August 8, 1983

.....Petition for Certiorari at 1a

APPENDIX B

State in the Interest of T.L.O., 185 N.J. Super. 279, 448 A.2d 493 (App. Div. 1982). Opinion of the Superior Court of New Jersey, Appellate Division, decided June 30, 1982

.....Petition for Certiorari at 22a

APPENDIX C

State in the Interest of T.L.O., 178 N.J. Super. 329, 428 A.2d 1327 (J.D.R.C. 1980). Opinion of the Juvenile and Domestic Relations Court of Middlesex County, New Jersey, decided September 26, 1980

.....Petition for Certiorari at 29a

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY,

Petitioner,

v.

T.L.O., a Juvenile,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of New Jersey

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QUESTIONS PRESENTED

1. Was the decision of the New Jersey Supreme Court to suppress evidence illegally seized from respondent by her high school vice-principal based upon independent and adequate State grounds?

2. In the alternative, as a matter of federal law, is application of the exclusionary rule constitutionally required when the prosecution attempts to use the fruits of an illegal search by a public school official on its case-in-chief in a criminal matter?

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**CONSTITUTIONAL AND STATUTORY PROVISIONS
INVOLVED**

New Jersey Constitution of 1947, Article I, paragraph 7.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

New Jersey Constitution of 1947, Article VIII, section 4, paragraph 1.

The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.

N.J. Stat. Ann. § 2A:4-60.

All defenses available to an adult charged with a crime, offense or violation shall be available to a juvenile charged with committing an act of delinquency . . . the right to be secure from unreasonable searches and seizures . . . shall be applicable in cases arising under this act as in cases of persons charged with crime.

N.J. Stat. Ann. § 18A:25-2.

A teacher or other person in authority over such pupil shall hold every pupil accountable for disorderly conduct in school and during recess and on the playgrounds of the school and on the way to and from school . . .

N.J. Stat. Ann. § 18A:37-1.

Pupils in the public schools shall comply with the rules established in pursuance of law for the government of such schools, pursue the prescribed course of study and submit to the authority of the teachers and others in authority over them.

N.J. Stat. Ann. § 18A:6-1.

No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending

such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary: (1) to quell a disturbance, threatening physical injury to others; (2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil; (3) for the purpose of self-defense; and (4) for the protection of persons or property; and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intendment of this section . . .

N.J. Stat. Ann. § 18A:37-2(j)

. . . Conduct which shall constitute good cause for suspension or expulsion of a pupil guilty of such conduct shall include. . .

j. Knowing possession or knowing consumption without legal authority of alcoholic beverages or controlled dangerous substances on school premises, or being under the influence of intoxicating liquor or controlled dangerous substances while on school premises.

STATEMENT OF THE CASE

On March 7, 1980, a search was made by Mr. Choplik, vice principal of Piscataway High School, of a purse belonging to T.L.O., a student at the school. Ms. Chen, a teacher, had made a routine check of the girls' restroom. She observed T.L.O. and another girl smoking tobacco cigarettes. (TS 20-7 to 25)¹ Although smoking by students was permitted in designated areas, it was not allowed in the restrooms. (TS 33-20 to TS 34-6) Ms. Chen accompanied both girls to Mr. Choplik's office, where she advised him of the infraction. (TS 21-1 to TS 22-23)

Upon being questioned, T.L.O. denied that she smoked. (TS 27-1 to 21) Mr. Choplik asked T.L.O. to give him her handbag because he wanted to see whether she had any cigarettes, which he believed would constitute proof that she had been smoking. (TS 31-1 to 13) When T.L.O. complied, Mr. Choplik

¹ "TS" designates the transcript of the hearing on the Motion to Suppress held on September 26, 1980. "T" refers to the transcript of the trial, conducted on March 23, 1981.

opened the purse and observed, "a package of Marlboros sitting right on the top there." (TS 28-3 to 11) As he removed the Marlboros, Mr. Choplik also observed cigarette rolling papers. He removed them, too. (TS 28-21 to TS 29-5) Mr. Choplik explained that "from then on I went to see what else was in there because from my experiences that seems to be a sign that someone is smoking marijuana." (TS 29-7 to 9)

Looking further into the handbag, he found a metal pipe, and one plastic bag containing tobacco or some similar substance.² (TS 29-10 to 16) He also found a wallet containing "a lot of singles and change," and inside a separate compartment of the purse, two letters and an index card. (TS 36-7 to 10; TS 38-6 to 12; TS 40-20 to 22; TS 39-4 to TS 49-11) Mr. Choplik then phoned T.L.O.'s mother, and the police. (TS 41-8 to 10)

Mr. Choplik admitted that T.L.O.'s purse was closed when she gave it to him and that he could not see inside until after he opened it. (TS 47-14 to 25) He also agreed that at the time Ms. Chen initially accused T.L.O. of smoking, he had a sufficient basis to impose a sanction without need for further evidence. (TS 47-9 to 13)

The local police transported T.L.O. and her mother to headquarters. Upon arrival, Officer O'Gurkins advised the juvenile of her *Miranda* rights. (T 20-7 to T 21-3) When Mrs. O. indicated that she wanted to have an attorney present during questioning, she was permitted to telephone the office of her lawyer. (T 34-10 to 24) He was not available, so the officer proceeded with the interrogation. According to Mrs. O., at no time did her daughter state that she had sold marijuana. (T 35-15 to 22)

Officer O'Gurkins admitted that although it was standard practice in juvenile matters to reduce incriminating state-

² At trial it was stipulated that the bag contained 5.40 grams of marijuana. (T 12-17 to 25)

ments to writing, he did not follow this procedure with T.L.O. (T 24-12 to 18) He nevertheless maintained that T.L.O. had confessed that she had been selling marijuana in school for a week. (T 22-2 to 17) He conceded that T.L.O. explained to him that the \$40.98, which was found in her purse, constituted the proceeds from her paper route, which she had collected the night before.

On September 26, 1980, a motion was brought before the Honorable George J. Nicola, J.J.D.R.C., to suppress the evidence seized as a result of Mr. Choplik's search. The search was found by the Juvenile Court to be legal, and the motion was denied. *State in the Interest of T.L.O.*, 178 N.J. Super. 329, 342-45, 428 A.2d 1327 (J.D.R.C. 1980). After a trial held on March 23, 1981, T.L.O. was found guilty of possession of marijuana with intent to distribute. On January 8, 1982, a probationary term of one year was imposed.

An appeal as taken and decided on June 30, 1982. *State in the Interest of T.L.O.*, 185 N.J. Super. 279, 448 A.2d 493 (App. Div. 1982). Two judges affirmed the denial of the motion to suppress the evidence secured by the search of the juvenile's purse, adopting the reasons set forth in the opinion of the trial court. However, they found that the record was inadequate to determine the sufficiency of the *Miranda* waiver which was allegedly made by the juvenile after her mother's unsuccessful attempt to summon counsel. *Id.*, 448 A.2d at 493. They therefore vacated the adjudication of delinquency and ordered a remand for further proceedings in light of the principles enunciated in *Edwards v. Arizona*, 451 U.S. 477, (1981) and *State v. Fussell*, 174 N.J. Super. 14 (App. Div. 1980). *Id.* One judge dissented, indicating that he would suppress the evidence found in T.L.O.'s purse because the search had been unreasonable. *Id.* at 495.

An appeal was taken to the New Jersey Supreme Court. On August 8, 1983, judgment was rendered ordering that the evidence seized from T.L.O. be suppressed. The court ruled that students are persons protected by both the United States

and the New Jersey Constitutions, and that the juvenile justice system must reflect the same fundamental fairness guaranteed to adult offenders. *State in the Interest of T.L.O.*, *supra*, 463 A.2d at 938. The argument that school officials be viewed as private persons acting *in loco parentis* was rejected; relying upon both federal and state case law, the court held that public school authorities are government officers. *Id.* at 939. It was further determined, citing to both decisions of the United States Supreme Court in administrative search cases, and to *N.J.S.A. 2A:4-60* (which accords juveniles the right to be secure from unreasonable searches and seizures) that if an official search violates constitutional rights, the resulting evidence is not admissible in criminal proceedings. *Id.*

With regard to the standards governing such searches, it was decided that a warrant need not be secured. *Id.* at 940. After reviewing various New Jersey statutes regulating education, the court found that school officials have the power to conduct reasonable searches necessary to maintain safety, order and discipline within the schools. *Id.* at 940. Analogizing to the decision of "Our Court" with regard to administrative searches, it was held that school searches come within the "carefully defined" class of searches which can be conducted without a warrant. *Id.* at 939.

Recognizing that school officials do not act pursuant to the same responsibilities and motivations as police officers, the Court rejected the juvenile's contention that school searches could only be carried out on the basis of probable cause. Adopting the approach taken by a number of state and lower federal courts, the Court ruled that "when a school official has reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order, the school official has the right to conduct a reasonable search for such evidence." *Id.* at 942.

Applying these principles to the facts surrounding the search of T.L.O., the New Jersey Supreme Court found that the principal did not have reasonable grounds to open her

purse. Since school policy allowed smoking in specially designated areas, and possession of cigarettes was not, therefore, a violation of school rules, Mr. Choplik had no reasonable grounds to believe that the student was concealing illegal substances in her purse. *Id.* at 942. The court further held that even if the initial opening of the purse had been reasonable, the subsequent "wholesale rummaging" of the student's letters and papers exceeded the proper scope of the search. *Id.* at 943.

Two judges dissented from the above decision finding that the assistant principal's search of T.L.O. was reasonable in light of all of the circumstances. *Id.* at 946.

SUMMARY OF ARGUMENT

Initially, respondent maintains that the judgment of the New Jersey Supreme Court was based upon independent and adequate state grounds, and that *certiorari* should be dismissed. Although the New Jersey court referred to federal law, the decision was also founded upon two provisions of the New Jersey Constitution (which guarantee the rights to be secure from unreasonable searches and seizures, and to receive a thorough and efficient education), and upon a New Jersey statute (which specifically grants to juveniles the right to be free of unreasonable searches). Because the decision is sufficiently and independently supported by state law, the outcome would remain the same even if the federal principles referred to therein should be modified. *Certiorari* must, therefore, be dismissed as this Court has no jurisdiction to issue advisory opinions.

Assuming *arguendo*, that the decision of the New Jersey Supreme Court does present a federal question for adjudication, petitioner's contention that the exclusionary rule need not be applied to the fruits of the illegal search at issue in this matter is clearly erroneous. The Fourth Amendment protects against unreasonable searches conducted by any governmental agency. Because public school personnel are employed by the state, act with state authority, and are responsible for carrying out state laws and regulations, their conduct con-

stitutes governmental, rather than private, action. Thus the search of T.L.O. by the vice-principal comes within the ambit of the Fourth Amendment.

While petitioner is correct in asserting that this Court has not found the exclusionary rule to be constitutionally required in the case of every Fourth Amendment violation, those instances where it has not been applied have involved limited, peripheral uses of the evidence so obtained. This Court has not permitted the fruits of an illegal search to be introduced into evidence on the prosecution's case-in-chief in a criminal proceeding, as the State seeks to do in the present matter. In such circumstances, application of the rule is mandatory.

Even if petitioner is correct in maintaining that a balancing test—weighing the benefits of deterrence against the societal costs resulting from implementation of the rule—is constitutionally permissible to determine if the exclusionary rule should be applied in the present circumstances, it is clear that the expected benefits would outweigh the anticipated detriments. First, educators do have an interest in the successful prosecution of juvenile delinquency proceedings and would be deterred from conducting unreasonable searches by the knowledge that the resulting evidence would be excluded. Second, if evidence illegally secured by educators was not admissible at trial, the police would be deterred from instigating teachers to conduct illegal searches in order to provide otherwise unobtainable evidence on "a silver platter." With regard to societal costs, statistical studies have shown that relatively few prosecutions are dismissed because of Fourth Amendment problems. School surveys do not support the conclusion that the crime rate in schools is rising or that an increase in searches by school personnel would be a significant factor in reducing the present rate.

Petitioner has demonstrated no alternatives to the exclusionary rule which would effectively deter violations of the Fourth Amendment rights of students. In addition, the exclusionary rule serves constitutionally recognized purposes

other than deterrence; it protects the imperative of judicial integrity, and teaches respect for constitutional rights.

LEGAL ARGUMENT

POINT I

AS THE DECISION BELOW RESTED ON ADEQUATE AND INDEPENDENT STATE GROUNDS THIS COURT SHOULD DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED.

Petitioner sought *certiorari* in this matter pursuant to 28 U.S.C. § 1257 which grants this Court jurisdiction when a "right privilege or immunity is . . . claimed under the Constitution" of the United States. The granting of a writ of *certiorari* does not, however, constitute a final disposition of the question of whether jurisdiction, in fact, exists for the case to be heard.

[T]he initial decision to grant a petition for *certiorari* must necessarily be based on a limited appreciation of the issues in a case. . . . The Court does not, and indeed it cannot and should not try to, give the initial question of granting or denying a petition the kind of attention that is demanded by a decision on the merits. *Ferguson v. Moore-McCormack Lines*, 352 U.S. 524, 527 (1957) (Frankfurter, J., dissenting).

As a threshold question, therefore, this Court must now determine if its jurisdiction has been properly invoked in this matter. See *University of California Regents v. Bakke*, 438 U.S. 265 (1978).

Article III of the Federal Constitution, the source of this Court's power, requires a live controversy between the parties to an action; the issuing of advisory opinions is not permitted. *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945); *The Monrosa v. Caroon Black, Inc.*, 359 U.S. 180 (1959); *Rescue Army v. Municipal Court*, 331 U.S. 549, 568 (1947). With regard to the decisions of state courts, this court has observed that:

Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.

And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, supra.

Thus where the decision of a state court rests upon both state and federal grounds, the jurisdiction of this Court fails if the state ground is independent of the federal and is adequate to support the judgment. *Id.*; *Fox Film Corp v. Muller*, 296 U.S. 207 (1935). If the state court would have reached the same result, regardless of federal law, considerations of federalism, and of the "case or controversy" requirement of Article III require that the state court's decision not be reexamined. *Enterprise Irrigation District v. Canal Co.*, 243 U.S. 157, 164 (1917).

The majority opinion in *Michigan v. Long*, ___ U.S. ___, 103 S.Ct. 3469 91983), decided last term, reaffirmed these principles even as it established more exacting criteria under which this Court would treat a state court decision as one based on state law. Jurisdiction would be found "in the absence of a plain statement that the decision below rested on an adequate and independent state ground." *Id.* at 3478. The sufficiency and independence of the state ground must be apparent from the "four corners of the opinion." *Id.* at 3475.

In the instant matter, a review of the opinion below leads inescapably to the conclusion that the outcome rests upon independent state grounds, and would be unaffected by any modification of the federal constitutional considerations alluded to in the opinion. At the very outset, the New Jersey Supreme Court noted that, "young people and students are persons protected by the United States and New Jersey Constitutions." (emphasis supplied) *State in the Interest of T.L.O.*, *supra*, 463 A.2d at 938. Thus the court clearly signalled that the decision would have its roots in both state and federal constitutional principles. The adequacy and sufficiency of the

state ground was plainly evidenced by further statements in the decision.

First, the court rested its conclusion that the State cannot use evidence illegally seized from a student against her in a juvenile proceeding upon a provision of the New Jersey Code of Juvenile Justice [N.J. Stat. Ann. § 2A:4-60] which guarantees to juveniles the right to be secure from unreasonable searches. *State in the Interest of T.L.O.*, *supra* at 939, n. 5. In concluding that suppression was required by this provision of state law, the New Jersey court also expressed its belief that the impropriety of so using evidence illegally obtained by public officials was settled, as a matter of federal constitutional law, by this Court's decision in *See v. City of Seattle*, 387 U.S. 541 (1967); *Camara v. Municipal Court*, 387 U.S. 523 (1967); and *Michigan v. Tyler*, 436 U.S. 499 (1978). However, reference to parallel federal decisions does not, of itself, compel a determination that a decision is based entirely upon federal law; only if it appears that the "state court felt 'compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did,' " [*Michigan v. Long*, *supra* 3478, quoting *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977)] is the asserted sufficiency of the alternate state ground undermined. *Id.*

Here, the New Jersey court did not hold that because federal law demanded the suppression of evidence resulting from illegal searches of students by teachers, N.J. Stat. Ann. § 2A:4-60 must be construed to require this result; on the contrary, it said, "Our Code of Juvenile Justice buttresses this conclusion." Thus the existence of N.J. Stat. Ann. § 2A:4-60 provided support independent of federal law for the decision that the evidence must be suppressed. Given this mandate of New Jersey law as construed by the highest judicial tribunal of the state, it is clear that "the same judgment would be rendered by the state court," [*Michigan v. Long*, *supra*, at 3476 (quoting *Herb v. Pitcairn*, *supra* at 126)], even if this defendant were protected only by the provisions of the New Jersey Juvenile Justice Code, thus rendering an interpretation of the Federal Constitution "nothing more than an advisory opinion." *Id.*

The New Jersey Supreme Court, based upon its understanding of this Court's decision in *See v. Seattle*, *supra*, *Camara v. Municipal Court*, *supra*, and *Michigan v. Tyler*, *supra*, found the United States and State Constitutions to be equally protective of the rights of student to be free from unreasonable searches by school teachers. "In such circumstances, even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate state ground of decision depriving this court of jurisdiction to review the state judgment." *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487, 491-92 (1965).

Furthermore in determining that educators are not private citizens, but governmental officials against whom the prohibition against unreasonable searches applies, the New Jersey Supreme Court cited both *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943), and to *State in the Interest of G.C.*, 121 N.J. Super. 108, 114, 296 A.2d 102 (J.D.R.C. 1972), a prior New Jersey decision involving a search of a student by a teacher. *State in the Interest of G.C.*, *supra*, in turn based its conclusion that teachers are government functionaries exclusively upon New Jersey civil case law. Consequently, even if this Court were to modify the federal constitutional principles underpinning *West Virginia Bd. of Ed. v. Barnette*, *supra*, the outcome in the instant matter would remain the same. Such a decision by this Court would, then, be purely advisory; the New Jersey courts would still be required by state law to hold that searches by school personnel amount to governmental action.

Furthermore, the New Jersey Supreme Court made explicit that its decision rested equally on state constitutional protections which have no federal analogue. The *T.L.O.* court concluded that "our approach represents the best way to vindicate each student's right to be free from unreasonable searches and to receive a thorough and efficient education." (emphasis supplied) *Id.* at 942. The right to a "thorough and efficient education" is guaranteed to all New Jersey children between the

ages of five and eighteen by Article VII, Section 4, paragraph 1 of the New Jersey Constitution (1947). The United States Constitution, as construed by this Court, has no such requirement. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). Moreover, the New Jersey Supreme Court does not merely pay lip service to state constitutional provisions as was the case in the state court decision in *Michigan v. Long*, *supra* at 3477. The court reviewed no less than seven statutory provisions³ which involve New Jersey educators in the regulation of student conduct that interfaces with the criminal justice process. Based on this analysis, the court concluded that "[w]e are satisfied that the Legislative scheme for public education in New Jersey contemplates a narrow band of administrative searches to achieve educational purposes." *Id.* at 940.

Since the educational guarantees of Article VIII, section 4, paragraph 1, have no corollary in the Federal Constitution, the New Jersey Court's reliance upon this ground is surely independent of any federal constitutional considerations. Moreover, in construing the constitutional mandate of a "thorough and efficient" education and its statutory implements, the New Jersey Court has a wholly sufficient basis to rule that school

³ N.J. Stat. Ann. § 18A:25-2 (West Supp. 1983) (disorderly conduct); N.J. Stat. Ann. § 18A:37-1 (West 1968) (submission of pupils to authority); N.J. Stat. Ann. § 18A:37-2(j) (West Supp. 1983) (school officials have power to suspend pupils for illegal possession or consumption of drugs and alcohol); N.J. Stat. Ann. § 18A:37-2.1 (West Supp. 1983) (assaulting teachers); N.J. Stat. Ann. § 18A:37-2 and N.J. Stat. Ann. § 18A:37-4 (West Supp. 1983) (suspension of students for good cause); N.J. Stat. Ann. § 18A:40-4.1 (West Supp. 1983) (role of principal when student abused drugs or alcohol); N.J. Stat. Ann. § 18A:35-4a (West Supp. 1983) (board of education shall establish policies and procedures for evaluating and treating alcohol users); and N.J. Stat. Ann. § 18A:6-1 (west 1968) (empowering teachers to seize weapons and quell disturbances).

children cannot be harassed by official searches except under certain narrowly limited circumstances.

Additionally, the *T.L.O.* decision is also rooted in Article I, paragraph 7 of the New Jersey Constitution (1947), which protects against unreasonable searches and seizures. For example, in deciding that a school official need not apply for a warrant, the New Jersey court cited two New Jersey cases in support of this proposition: *State v. Patino*, 83 N.J. 1, 414 A.2d 1327 (1980), and *State v. Bruzzese*, 94 N.J. 210, 463 A. 2d 320 (1983). *State in the Interest of T.L.O.*, *supra* at 939. Both of these cases specifically rely upon Article I, paragraph 7 of the State Constitution. Similarly, with regard to the standard by which the legality of school searches must be evaluated, the New Jersey court referred to several federal cases, but also relied upon *In re Martin*, 90 N.J. 295, 447 A.2d 1290 (1982), a case involving the reasonableness of administrative inspections of gambling casinos, decided pursuant to both the State and Federal Constitutions. *State in the Interest of T.L.O.*, *supra* at 941.

Although Article I, paragraph 7 of the New Jersey Constitution (1947), uses the same language as the Fourth Amendment, the New Jersey Supreme Court has frequently construed the state provision as guaranteeing more expansive protections. See *e.g.*, *State v. Alston*, 88 N.J. 211, 440 A.2d 1311, 1319 (1981) (finding that under the State Constitution a person's ownership of or possessory interest in property confers standing for search and seizure purposes, despite *Rakas v. Illinois*, 439 U.S. 128 (1978)); *State v. Johnson*, 68 N.J. 349, 346 A.2d 66, 67-68 (1975) (holding that under the State Constitution, if the prosecution wants to assert that a search was made pursuant to consent, the state has the burden of showing that defendant knew he could refuse; *contra* *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)); *State v. Hunt*, 91 N.J. 338, 450 A.2d 952 (1972) (requiring that under the State Constitution a warrant must be obtained to secure an individual's billing records from the telephone company, despite the decision in *Smith v. Maryland*, 442 U.S. 735 (1979) that a telephone user

has no Fourth Amendment expectation of privacy in phone company records.) Indeed had this case been decided in the New Jersey courts solely on federal constitutional grounds it is doubtful that the court would have even reached the issue of reasonableness in evaluating the search conducted in *T.L.O.* For, the facts of *T.L.O.* suggest that a "consent" cognizable under federal, but not New Jersey, law had been granted by the student whose purse was searched.⁴ *State in the Interest of T.L.O.*, *supra* at 940.

Furthermore, New Jersey has not been reticent in finding that provisions of its State Constitution and statutes extend greater protection than do equivalent provisions of the United States Constitution. "[S]tate constitutions exist as a cognate source of individual freedoms and . . . state constitutional guarantees of these rights may indeed surpass the guarantees of the federal constitution." *State v. Schmid*, 84 N.J. 535, 553, 423 A.2d 615 (1980). *See e.g.*, *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925 (1982) (enhanced equal protection accorded individual right to health and privacy; *contra Harris v. McRae*, 448 U.S. 297 (1980)); *State v. Schmid*, 84 N.J. 535, 553, 423 A.2d 615 (1980) (right of free speech on private university campus); *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 79 389 A.2d 465 (1978) (sex based presumptions may not be used to deny women employment rights equal to those accorded men); *State v. Saunders*, 75 N.J. 200, 216, 217, 381 A.2d 333 (1977) (right of sexual privacy; *but cf. Doe v. Commonwealth's Attorney for the City of Richmond*, 403 F. Supp. 1199 (D.C. Cir.), *aff'd* 425 U.S. 901, *reh. den.* 425 U.S. 985 (1976)); *Taxpayers Assn. of Weymouth Tp. v. Weymouth Tp.*, 80 N.J.

⁴ *See also State in the Interest of T.L.O.*, 178 N.J. Super. 329, 428 A.2d 1327 (J.D.R.C. 1980). *T.L.O.* had handed her purse to the vice-principal upon his request. The New Jersey courts relying on *State v. Johnson*, 68 N.J. 349, 346 A.2d 66 (1975) held that any consent by the juvenile was ineffective because she had not been told of her right to withhold consent. *But cf. Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

6, 43, 364 A.2d 1016 (1976) (equal protection standard requires real and substantial relationship between the classification and the governmental purpose which is purportedly served, *but cf. Dandridge v. Williams*, 397 U.S. 481, 485 (1970)); *In re Quinlan*, 70 N.J. 10, 19, 40-41, 51 355 A.2d 647 (1976), *cert. den. sub. nom. Garger v. New Jersey*, 429 U.S. 922 (1976) (right of choice to terminate life support systems as aspect of right of privacy); *So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel*, 67 N.J. 151, 175, 336 A.2d 713, *cert. den.* and appeal dismissed, 423 U.S. 808 (1975) (zoning obligation of municipalities to provide housing opportunities for lower income groups); *State v. Gregory*, 66 N.J. 510, 513-514, 333 A.2d 257 (1975) (expansion of the double jeopardy protection to require joinder of known offenses based on same conduct or arising from same criminal episode); *Robinson v. Cahill*, 62 M.J. 473, 482, 509, 303 A.2d 273 (1973) *cert. den. sub. nom.*, *Dickey v. Robinson*, 414 U.S. 976 (1973) (equal protection accorded right to an education); *Worden v. Mercer County Bd. of Elections*, 61 N.J. 325, 345-346, 294 A.2d 233 (1972) (college students entitled to vote in their college communities and may not be subjected to additional questioning). Thus, even a cursory review of New Jersey case law reveals an extensive and bona fide pattern of reliance upon the State Constitution for greater protections than mandated.

Respondent therefore maintains that since the decision below rests on independent and adequate state grounds and the outcome of this case would remain the same regardless of any changes in federal law, *certiorari* must be dismissed.

POINT II

THE FOURTH AMENDMENT EXCLUSIONARY RULE IS CONSTITUTIONALLY MANDATED WHEN THE STATE ATTEMPTS TO USE ON ITS CASE-IN-CHIEF EVIDENCE ILLEGALLY SEIZED FROM A STUDENT BY PUBLIC SCHOOL PERSONNEL.

This case arises from the prosecution's attempt to use evidence illegally seized from *T.L.O.*, a high school student, to directly prove her guilt of a criminal charge in a court proceed-

ing. Petitioner makes no attempt to demonstrate that the search was legal, but argues instead that when, as here, an illegal search is conducted by a school employee rather than a police officer, the Fourth Amendment exclusionary rule need not be applied. This contention is without legal or factual support. Since school employees are government agents, their actions are subject to the Fourth Amendment. Moreover, when evidence illegally obtained by government action is sought to be introduced on the prosecution's case-in-chief, application of the exclusionary rule is constitutionally mandated.

A. Searches Conducted By School Personnel Constitute Governmental Rather Than Private Action And Are Therefore Subject To The Fourth Amendment

The safeguards provided by the Constitution are not limited to adult citizens. *In re Winship*, 397 U.S. 358 (1979); *In Re Gault*, 387 U.S. 1 (1967). As was stated in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969):

School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.

On numerous occasions, albeit in other contexts, it has been decided by this Court that students do not "shed their constitutional rights . . . at the schoolhouse gate" [*Id.* at 506], and that conduct by school officials in derogation of these rights amounts to government action. *Id.*, at 506-07; *Island Trees Union Free School District No. 26 Board of Education v. Pico*, 457 U.S. 853 (1982); *Goss v. Lopez*, 419 U.S. 565 (1975); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Admittedly, with regard to the question of whether school personnel are government agents in the specific context of the

Fourth Amendment, this Court has thus far made no ruling. However, the great majority of lower federal, and state courts which have considered this question have concluded, as did the Supreme Court of New Jersey below, that searches of students by school employees constitute governmental action and come within the ambit of the Fourth Amendment.⁵

⁵ *Horton v. Goose Creek Independent School District*, 690 F.2d 470 (5th Cir. 1982), cert. den. ____ U.S. ____, 103 S.Ct. 3536 (1983); *M. M. v. Anker*, 607 F.2d 588 (2nd Cir. 1979); *Jones v. Latexo Independent School District*, 499 F.Supp. 223 (E.D. Tex. 1980); *Bilbrey v. Brown*, 481 F.Supp. 26 (D. Or. 1979); *Doe v. Renfrew*, 475 F.Supp. 1012 (N.D. Ind. 1979), mod. 631 F.2d 91 (7th Cir. 1980), reh. den. 635 F.2d 582 (7th Cir. 1980), cert. den. 451 U.S. 1022 (1980); *Bellnier v. Lund*, 438 F.Supp. 47 (N.D.N.Y. 1977); *M. v. Board of Education Ball-Chatham Community Unit School District No. 5*, 529 F.Supp. 288 (S.D. Ill. 1977); *Picha v. Wielgos*, 410 F.Supp. 1214 (W.D. Ill. 1976); *Smyth v. Lubbers*, 398 F.Supp. 777, 7876 (W.D. Mich. 1975); *United States v. Coles*, 302 F.Supp. 99 (N.D. Me. 1969); *In re W.*, 29 Cal. App. 3d 377, 105 Cal. Rptr. 775 (D. Ct. App. 1973); *In re C.*, 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (D. Ct. App. 1976); *State v. Baccino*, 282 A.2d 869 (Del. Super. 1971); *State v. F.W.E.*, 360 So. 2d 148 (Fla. D.Ct. App. 1978); *State v. Young*, 234 Ga. 488, 216 S.E. 2d 586 (1975), cert. den. 423 U.S. 1039 (1975); *State in the Interest of J.A.*, 85 Ill. App. 3d 567, 406 N.W. 2d 958 (App. Ct. 1980); *State v. Mora*, 307 So. 2d 317 (La. 1975), vac. 423 U.S. 309 (1975), remand 330 So.2d 900 (La. 1976); *People v. Ward*, 62 Mich. App. 46, 233 N.W. 2d 180 (App. Ct. 1975); *State in the Interest of T.L.O.*, supra, 463 A. 2d at 939; *Doe v. State*, 88 N.M. 347, 540 P.2d 827 (Sup. Ct. 1975); *People v. Singletary*, 37 N.Y. 2d 310, 372 N.Y.S. 2d 68 (Ct. App. 1975); *People v. Scott D.*, 34 N.Y. 2d 483, 358 N.Y.S. 2d 403 (Ct. App. 1974); *People v. Jackson*, 65 Misc. 2d 909, 319 N.Y.S. 2d 731 (App. Term. 1st Dept. 1971), aff'd 30 N.Y. 2d 734, 333 N.Y.S. 2d 167 (Ct. App. 1972); *State v. Wingerd*, 40 Ohio App. 2d 236, 318 N.E. 2d 866 (Ct. App. 1974); *State v. Walker*, 19 Or. App. 420, 528 P.2d 113, 115 (1974); *State v. McKinnon*, 88 Wash. 2d 75, 558 P.2d 781 (Sup. Ct. 1977); *Interest of L.L.*, 90 Wis. App. 2d 585, 280 N.W. 2d 343 (Ct. of App. 1979).

This conclusion is constitutionally required. It has long been recognized that while the Fourth Amendment has no application to conduct by private persons, it protects against invasion of privacy by any governmental agency. *Michigan v. Clifford*, — U.S. —, 104 S.Ct. 641, 646 (1984); *Michigan v. Tyler*, 436 U.S. 499, 504-05 (1978); *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921); *Gouled v. United States*, 255 U.S. 298, 305 (1920); *Weeks v. United States*, 232 U.S. 383, 391-91 (1914); *Boyd v. United States*, 116 U.S. 524, 532 (1886). The definition of "governmental agent" has not been limited to the police:⁶

The decisions of this Court firmly establish that the Fourth Amendment extends beyond the paradigmatic entry into a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of crime. As this Court stated in *Camara v. Municipal Court*, 387 U.S. 523, 528, 87 S.Ct. 1727, 18 L.Ed. 2d 930, the "basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." The officials may be health, fire, or building inspectors. Their purpose may be to locate and abate a suspected public nuisance, or simply to perform a routine periodic inspection. The privacy that is invaded may be sheltered by the walls of a warehouse or other commercial establishment not open to the public. See *v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed. 2d 943, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311-313, 98 S.Ct. 1816, 1819-1821, 56 L.Ed. 2d 305. These deviations

⁶ In point of historical fact, the Fourth Amendment developed in large part as a response to the Colonists' experiences not with the police, but with the regulatory agents designated to implement various parliamentary revenue measures. *Marshall v. Barlow's Inc.*, *supra* at 312. We do not know what the Framers' attitude would have been toward searches conducted by public school teachers, but as Chief Justice Burger has observed, "the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth." *United States v. Chadwick*, 433 U.S. 1, 8-9 (1977).

from the typical police search are thus clearly within the protection of the Fourth Amendment.
Michigan v. Tyler, *supra* at 504-05.

Thus, the Fourth Amendment has been held to apply to "administrative" searches by such non-police governmental employees as building inspectors [*Camara v. Municipal Court*, *supra*]; firemen [*Michigan v. Tyler*, *supra*]; occupational health and safety inspectors [*Marshall v. Barlows, Inc.*, 436 U.S. 307 (1978)]; alcohol tax collectors [*Jones v. United States*, 357 U.S. 493 (1958)]; and border patrol officers [*United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)]. None of these agents is primarily concerned with law enforcement; however, all are governmental employees, act with governmental authority, and are charged with the implementation of laws and regulations.

Similarly, it has been held that school personnel are government agents for Fourth Amendment purposes because they are state employees who rely on state authority for their actions. See *e.g.*, *Interest of L.L.*, *supra*, 280 N.W. 2d at 347; *People v. Scott D.*, *supra*, 358 N.Y.S. 2d at 405; *In the Interest of J.A.*, *supra*, 406 N.E. 2d at 960; *State v. Walker*, *supra*, 528 P.2d at 115-16; *State v. Baccino*, *supra*, 282 A.2d at 871; Comment, *Students and The Fourth Amendment: "The Torturable Class"*, 16 U.C.D.L. Rev. 709, 713-14 (1983) (hereinafter *The Torturable Class*). State regulation of teachers is pervasive, and boards of education are statutorily obligated to indemnify teachers in civil actions arising from their employment. *Bellnier v. Lund*, *supra* at 51.

State action has also been found because school authorities are responsible for enforcing numerous laws and regulations related to education. *State v. Mora*, *supra*, 307 So. 2d at 319. For example, some courts have noted that school attendance is compulsory, and school authorities are responsible for enforcing compliance with this legal mandate. See *e.g.*, *Bellnier v. Lund*, *supra* at 51; *D.R.C. v. State*, 646 P. 2d 252, 255 (Alas. Ct. App. 1982); *Horton v. Goose Creek Ind. School Dist.*, *supra* at 480.

Others have focused on the fact that educators have substantial regulatory duties with regard to the maintenance of a safe and orderly educational environment. See e.g., *Horton v. Goose Creek Ind. School Dist.*, *supra*; *Doe v. Renfrew*, *supra*, 475 F. Supp. at 1020; *Interest of L.L.*, *supra*; *State v. Baccino*, *supra* at 871; *People v. Jackson*, *supra*, 319 N.Y.S. 2d at 733. Certainly a review of state statutes would support this conclusion. In some states, educators have a statutorily imposed duty to maintain good order and discipline in the school.⁷ Others, including New Jersey, require teachers to enforce order in school and to hold students strictly accountable for any disorderly conduct.⁸

In many states, the prescribed duties of school employees are more specifically oriented toward law enforcement. A number require teachers and administrators to report evidence or incidents of crime to the police.⁹ In Alabama, a school employee who fails to make such a report is himself/herself guilty of a Class C misdemeanor. Ala. Code § 16-1-24 (Supp. 1983). Similarly, teachers in Mississippi and Rhode Island commit misdemeanors if they allow students to possess weapons on school grounds [Miss. Code Ann. § 973717 (1973)], or permit any act which injures, or frightens, any person attend-

⁷ See e.g., Fla. Sta. Ann. § 232.27 (1981); Ind. Code § 0-8.1-5-2 (Burns Supp. 1983); N.C. Gen. Stat. § 115C-307 (Supp. 1981); N.M. Stat. Ann. § 22-10-5 (1978); Wash. Rev. Code Ann. § 28A.27.010 (1982).

⁸ See e.g., Ariz. Rev. Stat. Ann. § 15-201 (1975); Ark. Stat. Ann. § 80-1629.2 (1980); Ky. Rev. Stat. Ann. § 161.180 (1980); La. Rev. Stat. Ann. § 17:416 (West Supp. 1983); Mont. Code Ann. § 20-4-302 (1983); Nev. Rev. Stat. § 391.270 (1979); N.J. Stat. Ann. § 18A:25-2 (West Supp. 1983).

⁹ See e.g., Cal. Educ. Code § 48909 (West 1973); Conn. Gen. Stat. Ann. § 10-233g(b) (West Supp. 1983); Hawaii Rev. Stat. § 296-71 (Supp. 1982); Ill. Ann. Stat. ch. 122 § 10-21.7 (Smith-Hurd Supp. 1982); Tenn. Code Ann. § 49-9-410.

ing the institution, respectively. R.I. Gen. Laws 11-21-2 (1981).

The fact that school personnel are state employees, and act with state authority to implement state laws and regulations governing education, compels the conclusion that they are governmental agents rather than private citizens for Fourth Amendment purposes.

1. The Doctrine Of *In Loco Parentis* Does Not Support The Conclusion That A Search Conducted By School Personnel Is Private Rather Than Governmental Action

As petitioner correctly notes [Brief of Petitioner at 8, n. 3], a few state courts have held that school authorities stand *in loco parentis* to students, and as would be the case with parents, their conduct constitutes private rather than governmental action for Fourth Amendment purposes. See *In re G.*, 11 Cal. App. 3d 1193, 90 Cal. Rptr. 361 (D. Ct. App. 1970); *In re Donaldson*, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (D. Ct. App. 1969); *People v. Stewart*, 63 Misc. 2d 601, 313 N.Y.S. 2d 253 (N.Y. Crim. Ct. 1970); *Commonwealth v. Dingfelt*, 227 Pa. Super. 380, 323 A. 2d 145 (Super. Ct. 1974); *Mercer v. State*, 450 S.W. 2d 715 (Tex. Civ. App. 1970).¹⁰ This holding has not been adopted by the great majority of lower courts which have considered this question [See Point IIA, Note 5, *supra*], and is, in the context of our contemporary system of public education, completely unfounded.

The advent of modern compulsory education laws has eroded the factual support which once existed for finding that educators stand *in loco parentis* to their students. See e.g., *Horton v.*

¹⁰ In light of subsequent decisions finding school employees to be government agents for Fourth Amendment purposes, the continued validity of the California and New York cases referred to by petitioner is questionable. Compare *In re G.*, *supra* and *In re Donaldson*, *supra*, with *In re W.*, *supra* and *In re C.*, *supra*. Compare *People v. Stewart*, *supra* with *People v. Scott D.*, *supra* and *People v. Jackson*, *supra*.

Goose Creek Ind. School Dist., *supra* at 229-30; *D.R.C. v. State*, *supra* at 255. At common law, the *in loco parentis* power was based on two premises: The parent specifically delegated his authority to the teacher, and the authority so delegated was limited only to such restraint and correction as was necessary to carry out the educational purposes for which the teacher was employed. Blackstone, 1 *Commentaries* 453, as cited by *Reder* at 530. *D.R.C. v. State*, *supra* at 255. Under our present educational system, these conditions no longer exist.

It can hardly be said that parents have voluntarily delegated their authority to the school system. *Id.* Certainly teachers no longer act as agents of the parents, bound by the same parental concerns. *Id.* As the Supreme Court of New Jersey noted with regard to this aspect of the *in loco parentis* doctrine, "[j]udges and commentators have not failed to detect the irony of this analogy. They suggest that parents infrequently search their children and turn the evidence over to the police for prosecution." *State in the Interest of T.L.O.*, *supra* 463 A.2d at 938, n. 4. Cf. *In re Gault*, *supra* at 18. Moreover, modern teachers cannot exercise their disciplinary powers solely for the benefit of the individual child. *Reder*, *supra*; *D.R.C. v. State*, *supra*. Educators now have responsibility for safeguarding the entire student body, and the needs of the individual student may have to be sacrificed for the good of all *Id.*; *Buss* at 768.

This Court has, in other contexts, recognized that educators do not function as parent substitutes. *Tinker v. Des Moines*

¹¹ The *in loco parentis* approach to the evaluation of school searches has also been severely criticized by commentators. See e.g., *The Torturable Class*, *supra* at 714; *Buss*, *The Fourth Amendment and Searches of Students in Public Schools*, 59 Iowa L.Rev. 739, 768 (1974) (hereinafter *Buss*); Trosch, Williams and DeVore, *Public School Searches and the Fourth Amendment*, 5 J.L. & Educ. 41, 53 (1982); *Reder*, *School Officials' Authority to Search is Augmented by the In Loco Parentis Doctrine*, 5 Fla. St. U.L. Rev. 526, 531 (1977) (hereinafter *Reder*); Comment, *Students and the Fourth Amendment: Myth or Reality?* 45 U.M.K.C. L.Rev. 282, 296-97 (1977).

Ind. School Dist., *supra* at 507; *Ingraham v. Wright*, 430 U.S. 651 (1977); *West Virginia Bd. of Ed. v. Barnette*, *supra* at 637. It has been held that the authority possessed by the school, to prescribe and enforce standards of conduct is, unlike that of the parents, limited and "must be exercised consistently with other constitutional rights." *Goss v. Lopez*, *supra* at 574; *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, *supra*; *Ingraham v. Wright*, *supra*.

The realities of contemporary public education compel the same conclusion in the instant matter. "What so many of the courts persist in talking about as a parental relationship between school and student is really a law enforcement relationship in which the general student society is protected from the harms of anti-social conduct. As such it should be subjected to law enforcement rules." *Buss* at 768. See also, *Picha v. Wielgos*, *supra* at 1218; *Jones v. Latexo Ind. School Dist.*, *supra*; *State v. Baccino*, *supra*. As most lower courts have found, educators act as agents of the government, not of the parents of their students, and as such their conduct is subject to the Fourth Amendment. See note 5, *supra*.

B. The Exclusionary Rule Is Constitutionally Mandatory When The State Intends To Utilize Illegally Seized Evidence On Its Case-In-Chief In A Criminal Matter

Petitioner maintains that even if school personnel are governmental agents bound by Fourth Amendment principles, the exclusionary rule need not be applied when these principles are violated.¹² Of the many lower federal and state courts, previ-

¹² *Amicus* New Jersey School Boards Association urges this Court to adopt a "good faith" exception to the exclusionary rule in the context of searches by school officials, an argument that was "not pressed or passed upon" in any court below. (*Amicus* Brief at 21-29). In *Illinois v. Gates*, ___ U.S. ___, 103 S.Ct. 2317 (1983), this Court refused to decide this precise issue, noting that because it had not been raised below, the factual record was likely to be inadequate. *Id.* at 2323. In addition, "due regard for the appropriate relationship of

ously cited, which have considered the school search issue, very few have adopted this approach. See *United States v. Coles*, *supra*; *Keene v. Rodgers*, *supra*; *D.R.C. v. State*, *supra*; *State v. Young*, *supra*; *State v. Wingerd*, *supra*. Nevertheless, petitioner argues that this minority view is consonant with the Fourth Amendment, and urges this Court to so hold.

The nature and purpose of the exclusionary rule have recently been the subject of some debate. Early decisions treated the rule as a constitutionally-mandated remedy for all Fourth Amendment violations. *Weeks v. United States*, 232 U.S. 383 (1941); *Mapp v. Ohio*, 367 U.S. 643 (1961). As petitioner correctly notes, beginning with *United States v. Calandra*, 414 U.S. 338, 349 (1974), this Court has taken a somewhat different view, focusing primarily on the deterrent effect of the exclusionary rule, and applying it in "those areas where its remedial objectives are thought most efficaciously served." See also *Stone v. Powell*, 428 U.S. 465, 486-87 (1976). Based upon this change of emphasis, petitioner asserts that the exclusionary rule need only be applied when the benefits of deterrence are equal to, or outweighed by the costs to society inherent in excluding relevant evidence of criminal conduct. (Brief of Petitioner at 14).

However, those cases, cited by petitioner in support of this contention, where implementation of the rule has been restricted involve only limited peripheral uses of the illegally

this Court to the state courts" required that the latter be given the first opportunity to rule on the question. *Id.* As the instant record is devoid of any facts pertaining to the good faith of the searching official, and as the New Jersey courts have been denied the opportunity to first rule on the question, the issue cannot be properly considered here. Moreover, since the standard governing school searches was well established in New Jersey at the time of the present incident, it is unlikely that objective good faith could be established. See *State in the Interest of G.C.*, 121 N.J. Super. 108, 296 A.2d 102 (J.D.R.C. 1972).

obtained evidence.¹³ In these unusual circumstances, it was determined that suppression of the evidence would have so little deterrent effect that the costs of enforcing the exclusionary rule would outweigh the benefits. None entailed, as is true in the instant matter, the introduction of the illegally obtained evidence on the State's case-in-chief at a criminal proceeding.¹⁴

This Court has never undermined this core deterrent function of the rule; "the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search." *United States v. Calandra*, *supra* at 349. Indeed, in *United States v. Calandra*,

¹³ See e.g., *United States v. Calandra*, *supra* (use of illegally obtained evidence permitted at a grand jury proceeding); *Walder v. United States*, 347 U.S. 62 (1954), and *United States v. Havens*, 446 U.S. 620 (1980) (prosecution allowed to use illegally obtained evidence to impeach credibility when defendant testified falsely at trial); *United States v. Janis*, 428 U.S. 433 (1976) (evidence secured illegally by state police admissible in civil suit brought by federal authorities to collect unreported taxes); *Stone v. Powell*, *supra* (refusal to consider on federal *habeas corpus* proceeding the failure of a state court on direct appeal to suppress evidence illegally obtained).

¹⁴ Petitioner argues that juvenile delinquency proceedings are rehabilitative rather than criminal in nature, and that implementation of the exclusionary rule would frustrate this "ameliorative purpose." (Petitioner's Brief at 15, n. 9) However, this Court long ago rejected the contention that benevolent motivations could justify depriving juveniles of constitutional rights. *In re Gault*, *supra* at 18-19. "[C]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts"; a proceeding in which a juvenile could lose his liberty for years is the functional equivalent of a felony prosecution. *In re Winship*, *supra* at 367. Furthermore, many secondary school students are prosecuted criminally, either because they are legally adults or are subject to one of the various state statutes which allow prosecutors to try older juveniles as adults. See e.g., *State v. Engerud*, 94 N.J. 331, 463 A.2d 934, 938 (1983).

Justice Powell, writing for the Court, reaffirmed the basic principle that evidence secured illegally "cannot be used in a criminal proceeding against the victim of the illegal search and seizure." *Id.* at 347. Similarly, in *Stone v. Powell*, *supra* at 493-94, while declining to enforce the exclusionary rule on collateral review, Justice Powell once again emphasized the view that it must continue to be implemented at trial and on direct appeal. Cf. *United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579 (1982).

In determining whether the exclusionary rule was applicable in a school disciplinary proceeding, the District Court of the Western District of Michigan noted that the decision in *Calandra* "was premised upon the availability of an exclusionary rule applicable to the authorities' case in chief . . ." *Smyth v. Lubbers*, *supra* at 794.

Moreover, the fact that the search at issue was conducted by other than a police officer has not produced a different result. Petitioner's assertions to the contrary notwithstanding, this Court has never confined the exclusionary rule to searches conducted by law enforcement officers. "If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal law or breaches of other statutory or regulatory standards." *Marshall v. Barlow's Inc.*, *supra* at 313. The exclusionary rule has been specifically applied to such non-police governmental officials as firemen [*Michigan v. Clifford*, *supra*]; alcohol tax agents [*Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970)]; border patrol officers [*United States v. Martinez-Fuerte*, *supra*].

The above governmental officers are not primarily concerned with the enforcement of criminal law. They are responsible for carrying out various statutory and regulatory schemes to promote health, safety, etc. Occasionally, as a result of the performance of their duties, non-criminal sanctions are imposed upon a violator; even more infrequently they discover evidence which results in a criminal prosecution.

Nevertheless, the exclusionary rule has been applied when their conduct in pursuit of their official responsibilities has been adjudged unreasonable by Fourth Amendment standards.

Similarly, school employees are charged with the responsibility of carrying out the legislative and administrative schemes formulated to promote public education. The enforcement of these regulations can result in the imposition of such quasi-criminal sanctions as suspension and expulsion upon student-violators; it can also result in the discovery of evidence upon which criminal charges are founded. As is the case with other governmental agents, the exclusionary rule is applicable when they exceed their authority.

Thus when, as in the instant case, the state attempts to utilize the fruits of an illegal search on its case-in-chief, the "cost-benefit" analysis proposed by appellant has no application. The exclusionary rule is constitutionally mandated even when the illegal search was conducted by government agents other than police officers.

C. Assuming *Arguendo* That The "Cost-Benefit" Test Proposed By Petitioner Is Appropriate In The Instant Case, Application Of The Exclusionary Rule Would Still Be Mandated Since The Expected Deterrence Benefits Would Outweigh Any Anticipated Detriments

Even assuming for the purposes of argument, that the "cost-benefit" approach were appropriate in this case, it is clear that the balance would weigh heavily in favor of the application of the exclusionary rule. The expected benefits with regard to the deterrence of conduct in violation of the Fourth Amendment would outweigh any anticipated detriments.

1. Application Of The Exclusionary Rule To School Searches Would Deter Violations Of The Fourth Amendment Because School Officials Have A Strong Interest In Seeing Criminal Actions Against Students Successfully Litigated

Application of the exclusionary rule to searches of students would substantially deter conduct in violation of the Fourth Amendment because school administrators do, contrary to petitioner's contentions, have a strong interest in seeing juvenile delinquency proceedings successfully litigated.¹⁵ Certainly, the primary concern of school administrators and teachers is education, not law enforcement. However, it has also been universally recognized that educators have an obligation to maintain a safe and orderly environment for the benefit of all students. *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, *supra* at 507; *Doe v. Renfrew*, *supra*, 475 F. Supp. at 1020; *Moore v. Student Affairs Comm. of Troy State University*, 284 F. Supp. 725, 729 (M.D. Ala. 1968); 3 LaFave, *Search and Seizure*, 10.11 at 458 (1978).

As previously noted, in most states, educators have statutorily imposed duties to maintain orderly conditions in the school, or to hold students strictly accountable for disorderly

¹⁵ Petitioner also makes the surprising assertion that because school authorities infrequently conduct searches, they cannot be expected to learn the basic rules governing search and seizure, or to moderate their conduct accordingly. (Petitioner's Brief at 16). Initially, it is difficult to understand why, if school searches occur so infrequently, petitioner insists that they are indispensable to the maintenance of a safe and orderly educational environment.

In any event, there is no legal support for the position that individuals can be held accountable only for those laws with which they have day to day contact. Furthermore, teachers as a group are well-educated and academically talented. Familiarizing them with basic Fourth Amendment principles would certainly present no serious difficulties. Indeed many educators are themselves responsible for teaching constitutional principles to their own students through history and civics courses.

conduct; in some, educators are even obliged to seek out and report to the police evidence of criminal conduct. See Notes 7, 8, and 9, *supra*. These obligations would, at a minimum, concern teachers with the enforcement of school regulations that further these ends and with the elimination of anti-social conduct which in addition to violating school regulations also contravenes criminal law.

In light of these responsibilities, it is manifest that teachers and other school officials have, in addition to their educational functions, substantial regulatory and law enforcement duties. Educators who fail to successfully carry out these duties would be evaluated accordingly by their superiors, and might personally suffer such detriments as loss of job or of promotions.

To comply with these mandates, it would be necessary that anti-social or disruptive conduct be prevented or immediately abated. While these ends may on occasion be achieved through internal disciplinary procedures, the more drastic measure of arrest, trial and conviction in the juvenile justice system would often "solve" the discipline problem with a minimum of effort on the part of the school system. For example, a successful juvenile prosecution could result, by mean of a reformatory or other custodial disposition, in the removal of the disruptive student from the school environment entirely. Or the student and his family could be compelled, as a condition of probation, to submit to psychiatric or other remedial counselling which they might not otherwise have been willing to seek.

In many states, the fact of a juvenile delinquency adjudication is *per se* grounds for suspension or expulsion.¹⁶ In other states, ground for expulsion or suspension include engaging in

¹⁶ See e.g., Alaska Stat. § 14.30.045 (1982); Kan. Stat. Ann. § 72-8901 (1980); La. Rev. Stat. Ann. § 17:416 (West 1983); Mich. Comp. Laws. Ann. § 380.1311 (West Supp. 1981); Nev. Rev. Stat. § 115-391 (Supp. 1981).

activity forbidden by the penal code.¹⁷ While such statutes may still necessitate the holding of some minimal due process hearing, certainly the fact of a juvenile delinquency adjudication would reduce the school's burden of proof to the production of a court document. The school system could thereby impose its own sanctions with a minimum of effort on its part.

Thus, school officials have a very direct interest in seeing juvenile prosecutions successfully concluded, and would therefore be deterred by the knowledge that illegally conducted searches will result in suppression of the evidence found. Certainly their interest is as strong as that of other regulatory, as opposed to law enforcement, agents to whom the exclusionary rule has already been applied.

Admittedly, building inspectors, revenue agents, firemen, like teachers, are not police officers, and do not primarily carry out searches with criminal law enforcement goals in mind. This difference has always been recognized by this Court and implemented not by elimination of the exclusionary sanction, but by adapting the conditions under which these species of search can be conducted. In so doing, the governmental interest which justifies the search has been balanced against the constitutionally protected interests of the citizen, and the nature and extent of the intrusion was appropriately limited. *Camara v. Municipal Court*, *supra* at 534-35. Thus, certain classes of administrative search have been authorized on the basis of standards less than probable cause. *Michigan v. Tyler*, *supra* at 507, n. 5. In some circumstances, the requirement of a warrant has been eliminated. See *e.g.*, *United States v. Martinez-Fuerte*, *supra* at 566-67. See also *Terry v. Ohio*, 392 U.S. 1 (1968).

¹⁷ See *e.g.*, Ind. Code Ann. § 20-8.1-5-4 (Burns Supp. 1983); Me. Rev. Stat. Ann. Tit. 20-A § 1001 (Supp. 1983); Neb. Rev. Stat. § 79-4, 180 (Supp. 1983); S.C. Code Ann. § 59-63-210 (Law Co-op. 1976).

This was the identical approach taken by the Supreme Court of New Jersey in the opinion below.¹⁸ *State in the Interest of T.L.O.*, *supra* at 941-42. After considering such governmental concerns as the duty of educators to maintain order, safety, and discipline in the schools, the necessity of creating a proper

¹⁸ Since the New Jersey Supreme Court found the search in this case to be invalid even under the reasonable grounds test and petitioner has not challenged the propriety of this finding, the question of the proper standard to be applied is not strictly at issue here. Respondent argued below and still maintains that the diluted "reasonable grounds" standard is not constitutionally permissible in this case. While the administrative search analogy may have some validity when applied to inanimate objects such as lockers, it breaks down completely when, as here, the person of a child is the subject of a significant intrusion on privacy and dignity. *Horton v. Goose Creek Ind. School Dist.*, *supra* at 477. In creating the few, narrowly defined exceptions to the warrant-probable cause requirement, this Court has balanced the governmental interests at issue against the nature of the intrusion. *Terry v. Ohio*, *supra* at 20-31 (1968); *Camara v. Municipal Court*, *supra* at 536-37. Thus, the lesser standard was authorized for administrative searches because these inspections are not aimed at the discovery of crime, are not personal in nature, and entail a rather limited invasion of a citizen's privacy. *Camara v. Municipal Court*, *supra* at 535-37. Similarly, the frisk exception is allowed because the intrusion is limited to a "pat-down" for the discovery of weapons, when an officer reasonably believes that his safety is threatened. *Terry v. Ohio*, *supra* at 28-29.

However in the school setting, the lesser standard has been applied not only to searches related to school rule violations, but also for evidence of crime. Clearly, the probable cause standard cannot be diluted in these circumstances. See *Id.* at 20-21; *Camara v. Municipal Court*, *supra* at 535; *State v. McKinnon*, *supra* at 787 (dissent of Rosellini, A.J.). *State v. Young*, *supra*, 216 S.E. 2d at 599 (Gunter J., dissenting).

Moreover if a school rule infraction is to be validly analogized to a regulatory code violation, the scope of the search permitted should be similarly limited. Nevertheless, in the school context full body searches have been authorized not merely "a limited intrusion of the kind

educational atmosphere, the fact that educators are not primarily concerned with law enforcement, and the necessity for immediate action when threats to the educational environment arise, the New Jersey Supreme Court ruled that a warrant need not be procured, and that a search can validly be conducted if the teacher has reasonable grounds to believe that the student possesses evidence of illegal activity or of activity that would interfere with school discipline and order. *Id.* at 941-42.

The majority of lower federal and state courts, which have considered this issue have taken the same approach, dispensing with the warrant requirement and permitting searches upon a lesser standard akin to that formulated by the New Jersey Supreme Court.¹⁹ By contrast, where the search of the

associated with the relaxed standards of reasonableness in *Camara* and *Terry*." *State v. Young*, *supra* at 600. Furthermore, school attendance is compulsory. Unlike the citizen who has entered a highly regulated business, who has purchased an airline ticket, or who intends to cross an international border, it cannot be said that a student has surrendered his reasonable expectation of privacy by voluntarily placing himself in a situation where an administrative inspection is inevitable. See *Jones v. Latexo Ind. School Dist.*, *supra* at 234. Thus the administrative search analogy is not viable.

Admittedly, few courts have adopted the traditional probable cause standard when a search has been conducted by school personnel. *State v. Mora*, *supra*. See also *M. M. v. Anker*, *supra* at 589; *State v. Young*, *supra*, at 594 (Gunter, J., dissenting); *State v. McKinnon*, *supra*, 558 P.2d at 785 (Rosellini, A.J., dissenting). Respondent nevertheless submits that the dilution of the probable cause-warrant standard in the school context is in violation of the Constitution.

¹⁹ See e.g., *Horton v. Goose Creek Ind. School Dist.*, *supra*; *M. M. v. Anker*, *supra*; *Jones v. Latexo Ind. School Dist.*, *supra*; *Bilbrey v. Brown*, *supra*; *Bellnier v. Lund*, *supra*; *Doe v. Renfrew*, *supra*; *M. v. Board of Education Ball-Chatham, etc. Dist. No. 5*, *supra*; *In re W*, *supra*; *In re C.*, *supra*; *State v. Baccino*, *supra*; *State v. F.W.E.*,

student was conducted by the police rather than school employees, courts have consistently imposed the probable cause test.²⁰

In concluding that this approach was adequate to protect both the legitimate interests of the state and the privacy rights of the students, these courts considered many of the same factors as were noted by the court in *State in the Interest of T.L.O.*, *supra*, as well as others which arise in the school search context. See e.g., *In the Interest of J.A.*, *supra* at 962 (the health and welfare of the students in the school's charge); *Jones v. Latexo Ind. School Dist.*, *supra* at 236 ("the unique role of education in our society"); *State v. Baccino*, *supra* at 871; and *People v. Jackson*, *supra*, 319 N.Y.S. 2d at 734-35 (the *in loco parentis* relationship between teacher and student); *Doe v. State*, *supra*, 540 P.2d at 830 (the "epidemic" of crime in the schools); *People v. Scott D.*, *supra* at 406-08 (the "lethal" threat of drug abuse on the increase in schools; the immaturity of students). Thus the difference in the nature of the search has already been balanced and accommodated by the use of a standard less than probable cause; further amelioration by dispensing with the exclusionary rule would reduce the Fourth Amendment protection to an empty shell.

supra; *People v. Ward*, *supra*; *Doe v. State*, *supra*; *State in the Interest of T.L.O.*, *supra*; *People v. Singletary*, *supra*; *People v. D.*, *supra*; *People v. Jackson*, *supra*; *State v. McKinnon*, *supra*; *In re L.L.* *supra*.

²⁰ See e.g., *Piazzola v. Watkins*, 442 F.2d 284 (5th Cir. 1971); *Picha v. Wielgos*, 410 F.Supp. 1214 (N.D. Ill. 1975); *Waters v. United States*, 311 A.2d 385 (D.C. App. 1973); *M. J. v. State*, 399 So.2d 996 (Fla. Dist. Ct. App. 1981); *People v. Bowers*, 72 Misc. 2d 800, 339 N.Y.S. 2d 783 (N.Y.C. Crim. Ct. 1973), *aff'd* 77 Misc. 2d 697, 356 N.Y.S. 2d 432 (1974).

2. Application Of The Exclusionary Rule To Evidence Seized Illegally By School Employees Would Deter Misconduct On The Part Of The Police

In addition to deterring Fourth Amendment violations by school personnel, application of the exclusionary rule to the school setting will also prevent misconduct on the part of the police. If evidence improperly obtained through a school search could nevertheless be admitted into evidence in juvenile delinquency or adult criminal proceedings, there would be a natural temptation for the police to instigate teachers to make searches which would be illegal for both police and school personnel. Moreover, this type of covert cooperation would be difficult to detect and impossible to prove.

That such would be the inevitable result of an inconsistent use of the exclusionary rule was recognized by this Court in an analogous setting in *Elkins v. United States*, 364 U.S. 206 (1960). In abolishing the "silver platter" doctrine, under which evidence illegally seized by state law enforcement authorities was still admissible in federal prosecutions, Justice Stewart wrote:

Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. *Id.* at 221-222.

Similarly by applying the exclusionary rule uniformly to evidence illegally obtained from students, whether seized by the police or by teachers, one strong incentive to conduct illegal searches would be eliminated. In deciding that the exclusionary rule must be extended to circumstances where evidence seized by a teacher is turned over to the police, the

Wisconsin Court of Appeals in *Interest of L.L.*, *supra* at 347, n. 1, agreed that

Once the evidence comes into the possession of law enforcement officers and is used in court proceedings against the liberty interests of the person searched, the exclusionary rule must be available to deter prosecutions based on unlawful searches. Without such exclusions, school personnel and other government employees would become the same sort of bypass around the amendment's protections that the Court meant to close by extending the exclusionary rule to state court proceedings in *Mapp v. Ohio*, *supra*.

Petitioner suggests that should school authorities conduct illegal searches at the behest of the police, the courts will recognize that fact and can then apply the exclusionary rule to suppress any fruits of that search. (Brief of Petitioner at 16-17) This optimistic proposal ignores reality. It was the fact that such subterfuge was virtually impossible to detect that prompted the decision in *Elkins v. United States*, *supra*. Only the enforcement of a uniform standard pursuant to which both the police and the school authorities would be sanctioned by exclusion of evidence illegally obtained would a resurrection of the "silver platter" doctrine be avoided.

Significantly, petitioner does not challenge the efficacy of the exclusionary rule with regard to the police. However, as *amicus curiae*, the Washington Legal Foundation suggests, based upon the research embodied in Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970) (hereinafter *Oaks*), and Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. of Leg. Stud. 243 (1973) (hereinafter *Spiotto*) that the exclusionary rule does not deter police misconduct. (See *Amicus* Brief at 9, n. 3). This assertion is wholly unwarranted for several reasons, not the least of which is Prof. Oaks' own belief that his findings proved to be inconclusive. *Oaks* at 755.

Oaks studied arrests for narcotics, weapons, gambling and stolen property in Cincinnati, reasoning that if the exclusionary-

ry rule was deterring unlawful conduct, the number of arrests for these crimes (which generally required evidence to be seized) would decline subsequent to the *Mapp* decision. Spiotto likewise confined his study to a single city, Chicago, but focused upon the number and success of motions to suppress filed in felony cases in the trial courts. These before and after evaluations are beset with inherent weaknesses.

First, the studies centered upon a single city. As the police response in Chicago and Cincinnati can hardly be characterized as typical, these studies failed to examine an adequate or representative sample. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against A Precipitous Conclusion*, 62 Kty. L. J. 681, 698, 702, 704, 720-22 (1974) (Hereinafter *Canon*). The whole notion of analyzing statistics on suppression motions as an indicator of police compliance is of questionable validity. Such a study cannot account for (1) the numerous cases that are discretionally screened out of the system by police and prosecutors who are mindful of the inevitable success of a suppression motion, (2) the fact that illegal searches which do not uncover incriminating evidence never come before judicial scrutiny, and (3) the effect of population growth and social changes (increasing drug use) upon the crime rate. Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 N.W. L. Rev. 740, 744 (1974) (hereinafter *Critique*); *Canon* at 718.

Additionally, as the decision in *Mapp* only forbade the introduction of illegally obtained evidence, but left the definition of such to be determined over a decade later in piecemeal pronouncements, the *Mapp* decision cannot be considered a singular concrete event such that findings as to police misconduct beforehand would be relevant to those afterward. *Canon* at 700-01. Furthermore, the Spiotto study is subject to individual criticisms, the most glaring of which is the researcher's mistaken belief that *Mapp* imposed the exclusionary rule in Illinois, when in fact the state had adopted it pursuant to state law in 1924. *Critique* at 754.

Indeed a more credible empirical study on the exclusionary rule indicates that it does in fact deter police misconduct. Based upon information from 19 cities, Prof. Canon observed a dramatic decrease in the number of arrests for "search and seizure sensitive" crimes after *Mapp* in approximately half of those cities; a substantial increase in the number of search warrants obtained; and the wide-spread adoption by police departments of policies designed to implement the *Mapp* decision. He concluded that "the exclusionary rule can and does have a very real, although hardly universal, deterrent effect on the police." Canon, *The Exclusionary Rule: Have Critics Proven that It Doesn't Deter Police?*, 62 Judicature 398, 400 (1979).

The application of the exclusionary rule to illegal school searches would, then, serve a second deterrent purpose by preventing misconduct on the part of the police.

3. The Societal Costs Of Implementing The Exclusionary Rule Are Insubstantial

Petitioner argues that enforcing the exclusionary rule would impose "a stiff societal cost" in that the prosecution would lose the use of evidence that would otherwise be probative and reliable. (Petitioner's Brief at 19) At the outset, it must be emphasized that the enforcement of a host of constitutional rights entails the same cost. The remedy for a denial of the Sixth Amendment's right to a speedy trial is the dismissal of the indictment, despite the fact that the prosecution may have overwhelming evidence, untainted by the constitutional violation, of the defendant's guilt. *See Barker v. Wingo*, 407 U.S. 514 (1972). Confessions taken in violation of the Fifth Amendment are excluded, even when circumstances demonstrate that the statement is trustworthy. *See Watts v. Indiana*, 338 U.S. 49, 50, n. 2 (1949); *Spano v. New York*, 360 U.S. 315, 320-21 (1959). Nullification is the most frequently imposed sanction for constitutional violations. Dellinger, *Of rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532

(1972). As the New Jersey Supreme Court noted below, "law enforcement would be easier without the Constitution, but that is not the way the Framers chose." *State in the Interest of T.L.O.*, *supra* at 942.

In the Fourth Amendment context, the cost is for the prosecution to do without evidence it would never have had if constitutional principles had been respected. The State is still free to continue the case based upon any other evidence it may have, independent of the illegal search. This is a far less stringent sanction than is required for a speedy trial violation where the entire prosecution is terminated.

Furthermore, empirical evidence shows that enforcement of the rule results in the dismissal of only a small minority of prosecutions. Studies have demonstrated that a low percentage of all complaints are rejected by prosecutors because of search and seizure problems. According to the independent Government General Accounting Office study of 2,804 cases handled by thirty-eight United States Attorney's Offices in 1978, search problems accounted for only 0.4% of the arrests declined for prosecution. Evidence was suppressed in only 1.3% of the cases actually filed, half of which still terminated in convictions. Comp. Gen. Rep. No. GGD-79-45, *Impact of the Exclusionary Rule on Federal Prosecutors*, 11, 13, 14 (1979).

Data developed in a recent study by the Department of Justice is consistent with the Government Accounting Office report. The study considered the effect of the exclusionary rule in state criminal prosecutions in California over a three year period. Presented by police with 520,993 felony cases, prosecutors rejected 86,033 (16.5%), only 4,130 of which (0.8% of the total arrests) were rejected for search problems. National Institute of Justice, *The Effects of the Exclusionary Rule: A Study in California* 1 (1982). A study of 7,500 felony prosecutions in Pennsylvania, Michigan, and Illinois found that suppression motions were filed in only 5% of the cases, and granted in only 0.7%. Nardilli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 Am. B. Found. Re-

search J. 3. See also Canon, *Ideology and Reality in Debate Over the Exclusionary Rule: A Conservative Argument for Its Retention*, 23 S. Tex. L. Rev. 559, 573-76 (1982); Davies, *Do Criminal Due Process Principles Make A Difference?* 1982 Am. B. Found. Research J. 247, 265.

In light of these findings, it can hardly be said that the cost to society in terms of "lost" convictions is substantial. Petitioner asserts that implementation of the exclusionary rule in the school context would exact an additional cost by deterring school authorities from taking effective action to provide a crime-free environment for learning. (Petitioner's Brief at 19) The National School Boards Association maintains that schools are being confronted with a "rising tide" of crime and that searches are a "vital tool" to combat this problem. (Brief of *Amicus Curiae* at 5). These contentions are without support.

At the outset, it appears necessary to emphasize that the holding of the New Jersey Supreme Court does not preclude school authorities from conducting searches. It merely requires that there be some reasonable grounds for doing so.

Moreover, surveys done at both the national and local levels have concluded that the incidence of crimes committed in schools by students has been on the decline since the mid-1970's. National Institute of Education (D.H.E.W.), *Violent Schools—Safe Schools: The Safe School Study Report to the Congress*, 2 (1978), ERIC #ED-175-112 (hereinafter *The Safe School Report*); L.E.A.A. National Institute of Law Enforcement and Criminal Justice, *School Crime: The Problem and Some Attempted Solutions*, 3-4 (1980), ERIC #ED-180-103 (hereinafter, *School Crime*); New Jersey Department of Education, *Final Report on the Statewide Assessment of Incidents of Violence, Vandalism and Drug Abuse in the Public Schools*, 57 (1982) (hereinafter, *New Jersey Final Report*); ERIC Clearinghouse on Educational Management/National School Boards Association, *Research Action Brief*, 2-3 (1982), ERIC

#ED-208-453 (hereinafter, *Research Action Brief*).²¹ With regard to drug abuse, a recent study prepared for the National Institute on Drug Abuse by the University of Michigan's Institute for Social Research concluded that "the 1980's represent a period of leveling and decline in drug use" among high school students. N.Y. Times, Feb. 7, 1984 at C9, col. 2 (city ed.).

The Safe School Study concluded that only 8% of the nation's school were experiencing a serious crime problem. *The Safe School Report* at 2. Some researchers feel that 4% is more accurate estimate. *Research Action Brief* at 3. While these studies conclude that problems with school exist and must be addressed, the findings suggest that schools are "not the hotbed of crime and violence" that petitioner asserts. *Research Action Brief* at 3., *School Crime* at 3.

In addition, there does not appear to be any reason to believe that the rate of crime is related to the ability of school personnel to conduct searches. For example, the Safe School Study identified a number of factors consistently found in schools with a high incidence of violence: High crime rate in the school's attendance area; higher proportion of male than female students attending; junior high school age level; large school population; lack of firmness in enforcing school rules; large class size; lack of relevance of academic courses to students; students' feelings that they have little control over what happens

²¹ In evaluating the findings of the reports cited herein it should be noted that they also include statistics on categories of crimes, such as vandalism, fighting, assault and arson, with which the use of a search is not normally associated. For example, the *New Jersey Final Report* indicates that between July of 1979 and June of 1981, the state's school districts reported 15,036 incidents of vandalism, 3,975 incidents of violence, and 2,212 incidents of drug abuse. *Id.* at 4. It would appear obvious that the most serious problem faced by the New Jersey schools over this period was vandalism, by an overwhelming margin. The utility of student searches to cope with this type of crime is doubtful.

to them. *The Safe School Report* at 8. As to property crimes, the study isolated these factors: High crime rate in the attendance area; high residential concentration near school premises; presence of non-student youth around school premises; unstable family conditions; large school size; lax rule enforcement; lack of coordination between faculty and administration; hostile and authoritarian attitudes on the part of teachers toward students; low student identification with teachers as role models; manipulation of grades as a disciplinary measure; intense competition for grades; intense competition for student leadership positions. *Id.* Many of these same problem areas have been identified by other studies. See e.g. Governor's (Mich.) Task Force, *School Violence and Vandalism Report* (1979), ERIC #ED-191-946 (hereinafter *Michigan Report*); *New Jersey Final Report* at 57; California State Department of Education, *Preliminary Report on Crime and Violence in the Public Schools* (1981), ERIC #ED-208-567; New Jersey School Boards Association, *School Violence Survey* (1977), cited in *Research Action Brief* at 3.

None of these studies found the infrequency of student searches to be a significant factor in schools with a serious crime problem. Moreover, of the many remedial measures proposed by these studies to reduce the existing crime rate, none involved increasing the intensity of student searches. On the contrary, the findings would seem to suggest that several of the conditions which are associated with a high crime rate could actually be exacerbated by an increase in the number of searches conducted, and by the failure to stringently penalize school personnel who conduct unreasonable searches.

The Safe School Study concluded that the incidence of crime is high in schools where "students feel they have little control over what happens to them," and where there are "authoritarian attitudes on the part of teachers toward students." *The Safe School Report* at 8. See also *The Michigan Report* at 10. It was found that "fairness in the administration of discipline and respect for students is a key element in the effective governance of schools," and that "close personal ties between teachers

and students" lower the risks of criminal conduct. *The Safe School Report* at 9. See also Clark, *Violence in Public Schools: The Problem and Its Solutions*, 8 (1978), ERIC #ED-151-990. Frequent searches of students, particularly where no reasonable basis exists justify the search, will not engender respect between educators and students, and will only increase the students' perception that they have no control over what happens to them. Failure to stringently sanction teachers who conduct illegal searches will only persuade students that enforcement of rules is inconsistent and unfair, and that adults are privileged to flout the rules with impunity.

It has been recognized that children have a greater need for protection against invasions of privacy than adults, and are more likely to suffer psychological damage when subjected to involuntary searches. *People v. Scott, D.*, *supra*, 34 N.Y. 2d at 490; *Jones v. Latexo Ind. School Dist.*, *supra* at 233-34; *Bellnier v. Lund*, *supra* at 53. As one commentator noted;

This possibility of harm is even more ominous since the innocent as well as the guilty suffer from unreasonable searches. One example of this is the case in which an entire fifth grade class was strip searched after one student told the teacher three dollars were missing from a coat pocket [See *Bellnier v. Lund*, *supra*]. The indignity and trauma created by the search was fruitless; no money was found. *The Torturable Class* at 731.

In light of these circumstances, the societal costs of applying the exclusionary rule in the school context will not outweigh the deterrence benefits.

D. Failure To Apply The Exclusionary Rule To Searches By School Personnel Would Leave Students With No Adequate Means Of Preventing Violations Of Their Fourth Amendment Rights

The Fourth Amendment merely defines the right of the people to be free of unreasonable searches and seizures. It is not self-executing. Some means must be devised by the courts to effectuate its guarantees, since it is manifest that a right without a remedy has no substance. *Mapp v. Ohio*, *supra* at

655. In the years between 1949 when *Wolf v. Colorado*, *supra*, applied the Fourth Amendment, but not the exclusionary rule to the states, and 1962, when *Mapp* made the exclusionary rule mandatory, the states were free to develop and implement any alternative remedies that would adequately protect the Fourth Amendment rights of its citizens. It was the failure of the states to do so that led to the decision to require application of the rule.²² *Mapp v. Ohio*, *supra* at 651-52. The inability or unwillingness of the states to devise an alternative suggests that no adequate substitute could be formulated, and that the exclusionary rule, with whatever its attendant problems, was found to be the most effective means available.

Petitioner nevertheless suggests, as alternatives, the bringing of civil suits against the offending school employee, and/or the use of internal disciplinary sanctions by the school system itself. (Petitioner's Brief at 17-18). These procedures have been found to be wholly inadequate with regard to the police, and petitioner has demonstrated no basis to conclude that they would be more successful in the school context.

1. Civil Suits Against School Employees Who Conduct Illegal Searches Would Have Inadequate Deterrent Effect

The alternative of a civil suit against the offending officer has long been recognized as an inadequate substitute for the exclusionary rule with regard to deterring police misconduct. *Elkins v. United States*, *supra* at 220. In his dissent to *Wolf v. Colorado*, 338 U.S. 25, 42-43 (1949), Justice Murphy recognized that the traditional tort action presented so many difficulties in the search and seizure context that it would rarely be successful, and would therefore have little deterrent effect. In some jurisdictions, no such cause of action would exist unless

²² Prior to the *Mapp* decision, 26 states had voluntarily adopted the exclusionary rule as the required method of deterring Fourth Amendment violations. See *Elkins v. United States*, *supra*, Appendix Table I.

physical harm could be demonstrated, and in any event the measure of damages would be the extent of the injury.²³ *Id.* To obtain punitive damages, malice must be proved, and the resulting award may be only nominal. *Id.* In the event of victory, the plaintiff may have difficulty in collecting damages from frequently "judgment-proof" officers. *Id.* at 44.

The possible federal remedies present a substantial barrier in the form of a qualified immunity available to government officials as defenses when they have acted in "good faith." See e.g., *Pierson v. Ray*, 386 U.S. 547, 557 (1967); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971); 42 U.S.C. § 1983. Moreover, it has been found that in this type of action, juries tend to focus upon the officer's belief in the legality of his conduct, and ignore the question of whether his belief was reasonable. Theis, *Good Faith as a Defense to Suits for Police Deprivation of Individual Rights*, 59 Minn. L. Rev. 991, 1009-12 (1975); Comment, *Accountability for Government Misconduct: Limiting Qualified Immunity and the Good Faith Defense*, 49 Temp. L.Q. 938, 951-953 (1976).

A number of other factors have also been recognized as rendering the civil alternative ineffective. Fear of reprisals from the police and prosecutorial agencies discourages both plaintiffs and their attorneys from bringing such suits. Amsterdam, *Prospectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 430 (1974). Plaintiffs also face the likelihood of jury prejudice in favor of the law enforcement officer, particularly if the plaintiff is himself a member of a minority group. Project, *Suing the Police in Federal Court*, 88 Yale L.J. 781, 783, 800 (1979).

²³ The absence of physical harm in suits alleging Fourth Amendment violations has resulted in low damage awards. Project, *Suing the Police in Federal Court*, 88 Yale L.J. 781, 789-90 (1979); Comment, *Presumed Damages for Fourth Amendment Violations*, 129 U.Pa. L. Rev. 192 (1980).

The cost of litigating such suits is prohibitive, and because of the dim prospects of success, the availability of contingent fee representation is unlikely. Gilligan, *The Federal Tort Claims Act—An Alternative to the Exclusionary Rule?*, 66 J. Crim. L. and P.S. 1, 7 (1975). Moreover, many victims of unconstitutional searches are unaware that the officer's conduct was illegal and actionable. Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 N.W.U.L. Rev. 790, 793 (1974).

All of these practical problems, identified in the context of civil suits against the police would have equal application to suits against school officials. Families would be hesitant to bring such suits while their children were still students under the jurisdiction of the defendants. The fear, and the likelihood, of reprisals would be as great if not greater in the educational context than with the police.

Juries could be expected to have the same sympathies for educators as they have historically held for law enforcement personnel. The children, and as a practical matter, their parents, would still have to have substantial financial resources to conduct the civil litigations. *Smyth v. Lubbers*, *supra* at 794. The probability of collecting money damages from judgment-proof school employees would be no better than from police officers. Moreover, children are even less likely than adults to understand when their rights have been violated and to realize that they can seek redress.

Furthermore, teachers and school administrators also have a qualified immunity from damages for claims of constitutional violation stemming from their "good faith" actions. See *Wood v. Strickland*, 420 U.S. 308 (1975); *Morales v. Grigel*, 422 F.Supp. 988, 1001 (D.N.H. 1976). Thus, in all but the most flagrant violations of a student's personal privacy, a teacher

could successfully defend on the grounds that though the search was illegal, he or she had acted in good faith.²⁴

These difficulties would, then, render the civil action an inadequate substitute for the exclusionary rule in the educational context. Certainly, the appellant has demonstrated no reason to assume that it would be any more effective a deterrent to illegal searches by teachers than it has been found to be to police officers. Indeed, after considering the difficulties inherent in bringing a civil suit in these circumstances, it has been recognized that without the exclusionary rule, school authorities "would be free to trench upon constitutional rights of the students in their charge without meaningful restraint or fear of adverse consequences." *Jones v. Latexo Ind. School Dist.*, *supra*, at 239; *Smyth v. Lubbers*, *supra* at 794.

2. Administrative Sanctions Against The Offending School Employee Could Not Be Sufficiently Enforced To Serve As An Effective Deterrent To Constitutional Violations

The use of sanctions against the individual who conducted the illegal search has also been proved to be an unsuccessful deterrent in the law enforcement context. The record of American search and seizure litigation strongly suggests that most breaches of the Fourth Amendment occurred if not at the explicit command, at least with the tacit approval, of the supervisors of the individuals carrying out the search. *Edwards, Criminal Liability for Unreasonable Search and Seizure*, 41 Va.L.Rev. 621, 628 (1955) (hereinafter *Edwards*) Under these

²⁴ Even with regard to such an extreme invasion of personal privacy as a strip search, the good faith immunity has been successfully asserted by a teacher in defense to a 42 U.S.C. 1983 action. In *Bellnier v. Lund*, *supra*, the District Court ruled that the law in the area of school searches was sufficiently unsettled that the defendant was immune from damages from her unlawful strip search of an entire class of fifth graders. Compare *Doe v. Renfrew*, *supra*, 631 F.2d at 91; *M. M. v. Anker*, *supra*, 477 F.Supp. at 837.

circumstances, those in authority would be more likely to protect an overzealous subordinate than to recommend criminal or administrative sanctions. *Id.*; *Franks v. Delaware*, 438 U.S. 168, 169 (1978); *Wolf v. Colorado*, *supra* at 42. Reported decisions reflecting that such penalties have been imposed are almost non-existent. *Edwards* at 629.

Such results could be expected in the educational context as well. If internal disciplinary procedures are never utilized, they can hardly serve any deterrent function. Moreover, as one commentator has suggested with regard to the police, if the alternative of personal sanctions could somehow be made to work effectively, the end result would likely be too much deterrence:

Critics of the exclusionary rule who would replace it with sanctions aimed directly at the offending officer often miss the point that if such sanctions were viable, they would deal a more crippling blow to law enforcement than does the mere exclusion of illegally-seized evidence . . . Under threat of sanctions imposed directly on the individual officer, . . . officers may forbear from acting, even when they think they have the right, for fear that those who review their actions will disagree. This additional deterrence at the margin is an unnecessary social cost.

Mertens and Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 Geo. L.J. 365, 408-09 (1981).

See also *Edwards* at 695; *Dellinger* at 1555.

In view of the small likelihood that personal sanctions would be imposed, and the problems that could be engendered even if such an approach could be effectively implemented, this proposed alternative is an inadequate substitute for the exclusionary rule.

E. In Addition To Deterring Violations Of The Fourth Amendment The Exclusionary Rule Is Constitutionally Required To Protect Judicial Integrity

Petitioner's argument that the exclusionary rule should not be applied to illegally conducted school searches is based upon

the contention that the sole purpose of this remedy is deterrence of future misconduct. Such was not, however, the historic basis upon which this rule was founded. In *Weeks v. United States*, *supra*, when this Court ruled that evidence seized in violation of the Fourth Amendment would be inadmissible in federal trials, the deterrence rationale was not mentioned.²⁵ Instead the unanimous Court held that:

The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights. *Id.* at 392.

See also *Olmstead v. United States*, 277 U.S. 438 (1928).

This justification, which has been labeled the "judicial integrity" [*Elkins v. United States*, *supra* at 222] rationale, was described thusly in *Terry v. Ohio*, 392 U.S. 1, 13:

Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur . . . When [unconstitutional] conduct is identified, it must

²⁵ Petitioner erroneously asserts that the exclusionary sanctions imposed in *Weeks*, *supra*, were intended for deterrent purposes. (See Petitioner's Brief at 9). Deterrence was not mentioned as a basis for the exclusionary rule until *Wolf v. Colorado*, *supra*.

be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.

Thus it is not merely the illegal seizure of evidence which the Fourth Amendment condemns, but its use as part of an evidentiary transaction commencing with the search and continuing through the prosecutor to the Court itself.

Since deterrence was first mentioned in *Wolf v. Colorado*, *supra*, as a supporting basis of the exclusionary rule, its theoretical importance has, admittedly, increased. See *e.g.* *United States v. Calandra*, *supra*; *United States v. Janis*, 428 U.S. 433, 458-59, n. 35 (1976). Nevertheless, it cannot be said that this Court has abandoned the imperative of judicial integrity. In *United States v. Johnson*, *supra*, this Court rejected the contention that deterrence forms the sole criteria for the applicability of the exclusionary rule. Retroactive effect was given to the decision in *Payton v. New York*, 445 U.S. 573 (1980) requiring police officers to obtain a warrant in order to arrest a suspect in his home, a point upon which the law had previously been unsettled. The decision to apply the *Payton* rule retroactively could hardly have been compelled by the need to deter future police misconduct. Reliance was instead placed upon the judicial integrity rationale as formulated by Justice Harlan in his dissent to *Desist v. United States*, 394 U.S. 244 (1969):

We do not release a criminal from jail because we like to do so or because we think it is wise to do so, but only because the Government has offended constitutional principle in the conduct of this case. *United States v. Johnson*, *supra*, 102 S.Ct. at 2594, quoting *Desist v. United States*, *supra* at 258.

Similarly, during the course of this Court's opinion in *United States v. Payner*, 447 U.S. 727 (1980), Justice Powell reaffirmed that the exclusionary rule serves the twofold purpose of deterring illegality and protecting judicial integrity. *Id.* at 734, n.8.

Despite the growing emphasis upon deterrence, this Court has not relinquished the older imperative of judicial integrity.

Indeed as previously set forth in Point IIB, *supra*, the concern with the deterrent effect of the exclusionary rule has predominated only in proceedings ancillary or collateral to a criminal trial. Thus far, this Court has not allowed illegally seized evidence to be introduced on the prosecution's case-in-chief against the victim of the search. Such is the position the petitioner presently urges upon this Court. To do so would strike at the heart of the principle of judicial integrity, and render the courts "accomplices in the willful disobedience of a Constitution they are sworn to uphold." See *Elkins v. United States*, *supra* at 222-23.

F. The Exclusionary Rule Serves A Constitutionally Prescribed Educational Function Most Appropriately Served In The Public School Context

The exclusionary rule has been recognized, in the context of the police, to serve an educative function:

More importantly, over the long term, this demonstration [the suppression of evidence secured by illegal searches] that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law-enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system. *Stone v. Powell*, 428 U.S. 465, 493 (1976).

As was long ago observed by Justice Brandeis, "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . If the Government becomes a lawbreaker, it breeds contempt for the law . . ." *Olmstead v. United States*, *supra* at 484-85 (1928) (dissent).

Surely the educative purpose of the exclusionary rule is more appropriately served in the school setting than in any other aspect of society. *Jones v. Latexo Ind. School Dist.*, *supra* at 239. "Students look to teachers, school administrators and others in positions of authority as models for their own behavior and development into responsible adults." *Id.* It

would be ironic in the extreme if in our schools, the institution upon which we rely to teach our children the rights and responsibilities of our constitutional form of government, violations of those rights are countenanced rather than met with the most stringent remedies available. "[H]ow can teachers serve as models for behavior if they disobey the law?" Koff, *Coping with Disruptive Students*, 63 Nat'l Assoc. of Sec. Sch. Principals Bull. 8, 14 (Feb. 1979).

The special educational significance of the Fourth Amendment in the school setting was eloquently expressed by Justice Brennan in his dissent from the denial of *certiorari* in *Doe v. Renfrew*, *supra*, 451 U.S. at 1022, a case in which the entire student body of a secondary school was subjected to searches by specially trained dogs:

We do not know what class petitioner was attending when the police and dogs burst in, but the lesson the school authorities taught her that day will undoubtedly make a greater impression than the one her teacher had hoped to convey. I would grant *certiorari* to teach petitioner another lesson: that the Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and that before police and local officers are permitted to conduct dog-assisted dragnet inspections of public school students, they must obtain a warrant based on sufficient particularized evidence to establish probable cause to believe a crime has been or is being committed. Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedom.

If, as a result of the decision in the instant matter, students are accorded Fourth Amendment rights, but are denied any adequate means of protecting those rights, this Court will have effectively taught them "to discount important principles of our government as mere platitudes." See *West Virginia State Bd. of Education v. Barnette*, *supra* at 637

CONCLUSION

For the foregoing reasons, respondent respectfully requests that certiorari be dismissed, or in the alternative, that the decision of the Supreme Court of New Jersey be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY,

Petitioner,

—vs.—

T.L.O., a Juvenile,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

**BRIEF OF
THE AMERICAN CIVIL LIBERTIES UNION
AND THE AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY,
AMICI CURIAE
IN SUPPORT OF AFFIRMANCE**

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members, dedicated to preserving and protecting the liberties guaranteed in the Constitution. The American Civil Liberties Union of New Jersey is one of its state affiliates, which previously filed a brief amicus curiae in this case with the New Jersey Supreme Court.

The ACLU and its affiliates have devoted particular attention in recent years to the rights of groups who, because of their exclusion from the political process for various reasons, are in particular need of the anti-majoritarian protections of the Bill of Rights. Our experience working with students has convinced us that their Fourth Amendment rights are especially important, in order to

protect them from harms of unreasonable, arbitrary, or intrusive searches, and, as the New Jersey Supreme Court observed in the words of Justice Jackson, to "educat[e] the young for citizenship...[and to ensure that our young are not taught] to discount important principles of our government as platitudes."

We therefore file this brief amici curiae, with the consent of the parties,¹ to demonstrate that the understandable and valid concerns for school safety and the preservation of an effective learning environment that petitioner and its amici raise do not come close to justifying the wholesale removal of effective Fourth Amendment rights at the schoolhouse gate.

1. Letters of consent are being filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

1. This Court has consistently held that juveniles, as well as adults, are "persons" whose rights are to be protected from governmental intrusion under the United States Constitution. A juvenile does not shed these constitutional rights, including the right to be free from unreasonable searches under the Fourth Amendment by governmental agents, such as school officials, at the schoolhouse gate.

2. Where a juvenile manifests an expectation of privacy in an item such as her pocketbook, the juvenile does not abandon her right to privacy upon entering school. Since for every search of a student that uncovers evidence of wrongdoing, a plethora of innocent impressionable juveniles will have had their expectation of privacy shattered and their

right to be secure from unreasonable searches violated, it is essential that juveniles' Fourth Amendment rights be protected in and out of school.

3. The exclusionary rule is no less vital where the search is conducted in school than where it is conducted in similar non-law enforcement administrative contexts. Applying the exclusionary rule would inhibit collusion between school officials and the police, deter arbitrary and unchecked searches of students by school officials, and provide a meaningful mechanism for discouraging unwarranted invasions of the right of juveniles to be secure from unreasonable searches and seizure.

4. The doctrine of in loco parentis, which was created as a benevolent means to protect juveniles, cannot be applied to deny juveniles essential constitutional rights.

In addition, since school officials more closely represent the interests of the State than the parents (or juveniles), they should be held to a probable cause standard before they are allowed to search the juveniles.

5. The decision by the New Jersey Supreme Court, although not requiring school officials to satisfy the probable cause requirement before searching a student, at least attempts to balance the need of school officials to conduct reasonable searches of students in school with the right of students to be free from unreasonable searches and seizures. The New Jersey Supreme Court's "reasonable grounds" standard at least would prevent arbitrary and capricious searches by school officials and provide some protection for students to be free from unreasonable searches and seizures.

ARGUMENT

I. JUVENILES DO NOT SHED THEIR FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES AT THE SCHOOLHOUSE GATE.

Although it has not been and could not be seriously argued that juveniles, as well as adults, are not "persons" who are protected from unreasonable searches by governmental officials outside of the school setting, the Petitioner in this matter essentially is arguing that juveniles lose this constitutional protection upon entering school. However, this Court consistently has held that students do not shed their constitutional rights at the schoolhouse gate. See, e.g., Goss v. Lopez, 419 U.S. 565 (1975) (Fourteenth Amendment due process clause applicable to student suspensions because a suspension constitutes a deprivation of the student's property rights); Tinker v. Des

Moines Indep. Community School Dist., 393 U.S. 503 (1969) (First Amendment rights are applicable to students because students are persons under the Constitution); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (since the Constitution protects all citizens, adults and children alike, students cannot be compelled to pledge allegiance to the flag).²

The Fourth Amendment protects "persons," including adults and juveniles who are in school or out of school, from unreasonable searches by governmental officials. See Washington v. Chrisman, 455 U.S. 1 (1982)

2. Underlying these decisions is the holding that the conduct of school officials, as "governmental agents," involves state action and the students therefore must be afforded the protections of the United States Constitution. See also Board of Educ. v. Pico, 457 U.S. 853 (1982); Ingraham v. Wright, 430 U.S. 651 (1977); Wood v. Strickland, 420 U.S. 308 (1975).

(university student protected by the Fourth Amendment where his property was searched by a school official who was employed as a security guard).³ As this Court emphatically declared in the landmark decision of Tinker v. Des Moines Indep. Community School Dist., 393 U.S. at 511:

Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect.

3. See also N.J. Stat. Ann. 2A:4A-40 (West Supp. 1983), in which the New Jersey Legislature specifically mandated that this protection be applied fully to juveniles. This Statute, which provides in pertinent part that "(a)ll defenses available to an adult charged with a crime, offense, or violation shall be available to a juvenile charged with committing an act of delinquency," superseded N.J. Stat. Ann. 2A:4-60, which contained identical language and was cited in State in Interest of T.L.O., 94 N.J. 331, 342n.5 (1983). Based upon this Statute and for the reasons advanced by the Respondent, it is respectfully submitted that this Court improvidently granted certiorari and is precluded from deciding in this case whether juveniles have less Fourth Amendment rights in the school setting than adults.

Under the Fourth Amendment, any warrantless search of a person or his/her property is prima facie invalid and gains validity only if it comes within one of the specific exceptions that have been created by this Court. See Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The only such exception to the Fourth Amendment that deals, as here, with a search by a non-police governmental official, involves administrative searches by officials who are not concerned with law enforcement per se, but rather are concerned with virtually the same type of administrative supervision and inspection as public school officials. See, e.g., Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (inspectors from the Occupational Safety and Health Administration); Michigan v. Tyler, 436 U.S. 499 (1978) (firefighters); Camara v. Municipal

Court, 387 U.S. 523 (1967) (building inspectors); Jones v. United States, 357 U.S. 493 (1958)(federal alcohol agents).

As Justice White explained for the majority in Marshall v. Barlow's, Inc., 436 U.S. at 312-313,

the Fourth Amendment prohibition against unreasonable searches protects against warrantless intrusions during civil as well as criminal investigations. Ibid. The reason is found in the "basic purpose of this Amendment. . . [which] is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara, supra, at 528, 18 L Ed 2d 930, 87 S Ct 1727. If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards.

Since "(t)he authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when

to search and whom to search," id. at 323, this Court required probable cause for the search either by a showing of specific evidence of an existing violation or a showing that reasonable legislative or administrative standards have been satisfied with regard to the particular property. Id. at 320.

As with the inspectors in Marshall v. Barlow's, Inc., as well as the other administrative search cases, public school officials are charged with the responsibility for maintaining the safety of property and people, in this case schools and the students who attend them. Indeed, at least in New Jersey, school officials are required by statute to maintain order in the schools, see N.J.Stat.Ann. 18A:25-2 (West Supp. 1983), in much the same way as the inspectors in

Marshall were required by the Occupational Safety and Health Act (OSHA), 29 U.S.C. §651-678 (1983), to maintain safety and health in the workplace.

In addition, the repercussions that may be suffered by a juvenile are no less severe than those that may be suffered by an employer whose business is inspected under OSHA. Even putting aside the plethora of innocent impressionable students who would be traumatized by being searched,⁴ a student who is searched faces the loss of significant property and liberty rights, such as expulsion or suspension from school, decreased opportunities for acceptance into an institution of higher learning, and increased difficulty in obtaining many jobs. The

4. The potentially lifelong trauma that can result from such searches of juveniles is discussed at length in Point II, infra.

student also faces, as here, criminal sanctions as a result of such a search.⁵

5. As explained by the American Bar Association's Institute of Judicial Administration in ABA Standards Relating to Schools and Education 1 (1982):

The school is also an important part of the system of juvenile justice. The law in the United States compels children to attend school. A. Steinhilber and C. Sokolowski, State Laws on Compulsory Attendance (1966). In school the child is subjected to an extensive body of rules, the violation of which results in various forms of punishment (or "discipline"). Not infrequently a sanction entails exclusion from school--a sentencing to the life of the streets. From there, a child may pursue a course of conduct that will bring him or her within the jurisdiction of the juvenile court. There is a close correlation between children in trouble in school and children in trouble with the law.

The ABA therefore recommended that if "the sanction that might result from the suspected misconduct includes expulsion, long-term suspension, or transfer to a school used or designated as a school for problem students of any kind, the search should be subject to all of the requirements of a police search." Id. at p. 31, §8.7B. In addition, "(a)ny evidence obtained directly or indirectly as a result of a search in violation of these standards should be inadmissible (without the student's express consent) in any proceeding that might result in either criminal or disciplinary sanctions against the student." Id., §8.8.

There is simply no basis in the law or logic to deny a juvenile these Fourth Amendment safeguards while at the same time subjecting the juvenile to the loss of these property rights and criminal punishment. Thus, as in the administrative search cases, school officials should be required to have probable cause before searching a student.

II. JUVENILES DO NOT ABANDON
THEIR EXPECTATION OF PRIVACY
BY ATTENDING SCHOOL.

Where, as here, a juvenile (or an adult) manifests an expectation of privacy in an item such as her pocketbook, which society generally recognizes as a reasonable expectation, the juvenile's right to maintain this privacy should not be affected by being in or out of school. See Smith v. Maryland, 442 U.S. 735, 740-741 (1979); United States v. Knotts, _____ U.S. _____, _____, 103 S.Ct.

1081, 1084-1085 (1983). See also Doe v. Renfrow, 451 U.S. 1022 (1981) (Brennan, J., dissenting from the denial of a petition for a writ of certiorari). Cf. Arkansas v. Sanders, 447 U.S. 753 (1979). In the similar situation involving a non-police governmental official, a firefighter whose purpose was to search a building for evidence of arson, this Court in Michigan v. Tyler, 436 U.S. 499, 506 (1978), explained that

there is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman, or because his purpose is to ascertain the cause of a fire rather than to look for evidence of a crime, or because the fire might have been started deliberately. Searches for administrative purposes, like searches for evidence of crime, are encompassed by the Fourth Amendment.

Accord Michigan v. Clifford, _____ U.S. _____, 104 S. Ct. 641 (1984).

A student's reasonable expectation of privacy is no less diminished because the official who is conducting the search is wearing the "uniform" of an educator and is investigating a suspected problem in the school. This expectation of privacy, especially in a repository for personal items, such as the student's own pocketbook in the present case, is not left outside when the student enters school.⁶

The right of juveniles in and out of school to such an expectation of privacy from governmental intrusion must remain paramount when dealing with impressionable youths who are formulating a sense of their own being,

6. Curiously, it is unclear what, if anything, the school official who searched T.L.O. suspected was in her pocketbook. Even if he suspected that she had cigarettes, possession of cigarettes on school grounds was not a violation of school rules. In fact, the school had designated areas for the students to smoke cigarettes.

as well as respect for societal values. For every search of a student that uncovers evidence of wrongdoing, countless innocent students will have had their expectation of privacy shattered and their right to be secure from such searches violated. As William Buss succinctly wrote in "The Fourth Amendment and Searches of Students in Public Schools," 59 Iowa L. Rev. 739, 792 (1974):

There is a very good chance that an erosion of privacy and the destruction of human values that go with privacy is a greater long-range danger than the behavior that would be detected and deterred by student searches. It would be highly desirable if the citizens of the United States who are now in school learn to value privacy, learn by the school's example that the society respects it, and learn that the courts will protect it from invasion by governmental searches that violate fourth amendment principles.

Thus, the constitutional right of juveniles to be free from unreasonable searches and seizures when they enter school should be

jealously protected by this Court. Juveniles' rights cannot be violated due to the fear of the use of drugs either outside or inside school or simply as an expediency to maintain school discipline.⁷ Constitutional rights cannot be shed so easily. Indeed, there can be no question that the Constitution "protects the citizen against the State itself and all of its creatures -- Boards of Education not excepted." West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

III. THE NECESSITY FOR THE EXCLUSIONARY RULE IS NO LESS VITAL IN THE EDUCATIONAL SYSTEM THAN IN SIMILAR NON-LAW ENFORCEMENT CONTEXTS.

The State appropriately acknowledges

7. As Justice Brennan aptly pointed out in Florida v. Royer, ____ U.S. ____, ____ S.Ct. 1319, 1332 (1983)(concurring opinion), "(a)lthough I recognize that the traffic in illicit drugs is a matter of pressing national concern, that cannot excuse this Court from exercising its unflagging duty to strike down official activity that exceeds the confines of the Constitution."

that public school officials are governmental agents and that the Fourth Amendment applies to the search of students but argues that the exclusionary rule should not be applied to the school setting. The exclusionary rule is no less vital for the enforcement of the Fourth Amendment rights of juveniles in school (and out of school) than for adults who are searched by similar non-law enforcement officials to whom this Court has applied the exclusionary rule. See, e.g., Michigan v. Clifford, ____ U.S. ____, 104 S.Ct. 641 (1984)(fire department investigators); Michigan v. Tyler, 436 U.S. 499 (1978)(firefighting officials); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (inspectors for the Occupa-

tional Safety and Health Administration).⁸
See also Donovan v. Dewey, 452 U.S. 594, 604 (1981)(the requirements of the Fourth Amendment are satisfied regarding the search of a mine where "rather than leaving the frequency and purpose of inspections to the unchecked discretion of Government officers, the Act [the Mine Safety and Health Act, 30 U.S.C. §801-962 (West Supp. 1983)] establishes a predictable and guided federal regulatory presence."). As Justice White explained for the majority in Camara v. Municipal Court, 387 U.S. 523, 528 (1967), "(t)he basic purpose of this Amendment, as recognized in countless

8. The exclusionary rule also recently has been applied where, as in the case of a student who is called into the office of a school administrator, a suspect who was detained did not believe he was free to leave the room in which the search was conducted. Florida v. Royer, _____ U.S. _____, 103 S.Ct. 1319 (1983).

decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials," not only the police.

In addition, the exclusionary rule has no less a deterrent effect regarding such arbitrary invasions in the school setting than it does in other administrative settings. For example, since evidence seized during searches by school and other administrative officials often is turned over to the police for use in criminal proceedings, applying the exclusionary rule also would unquestionably inhibit collusion between school officials and the police.⁹

9. As explained in Camara v. Municipal Court, 387 U.S. 523, 530-531 (1967), where regulations for maintaining order are enforceable by criminal sanctions, the Fourth Amendment's protections are critical:

(Footnote 9 continued on next page)...

In this regard, this situation is virtually indistinguishable from the "silver platter doctrine," which this Court emphatically rejected in Elkins v. United States, 364 U.S. 206 (1960) (evidence obtained by State

...(Footnote 9 continued from preceding page)

It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.... Like most regulatory laws, fire, health and housing codes are enforced by criminal processes. In some cities, discovery of a violation by the inspector leads to a criminal complaint.

If the Fourth Amendment is to be anything other than a hollow unenforceable right for juveniles, the exclusionary rule also must be applied to safeguard juveniles who otherwise would wrongfully be subjected to criminal sanctions as a result of searches by school officials. This is especially true in States that require school officials to report evidence of criminal activity to the police. See, e.g., Ala. Code §16-1-24 (Supp. 1983); Cal. Educ. Code §48902 (West Supp. 1983); Conn. Gen. Stat. Ann. § 10-233g (West Supp. 1983); Ill. Ann. Stat. ch. 122 §10-21.7 (Smith-Hurd Supp. 1982); Tenn. Code Ann. §§ 49-6-4209, 4301 (1983).

officials during an illegal search cannot be used by federal officials). As this Court held in Elkins, although cooperation between various governmental entities is to be encouraged, where one of those entities is not entitled to conduct a search in order to obtain evidence, it can neither directly or indirectly encourage another entity to obtain such evidence nor accept such evidence from the other governmental entity:

Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by state agents will

be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered.

Id. at 221-222.¹⁰

10. Not only would the exclusionary rule deter any such collusion between school officials and the police, but judicial integrity also would be enhanced because the courts would not be placed in the position of admitting evidence in a criminal proceeding that, if seized by the police rather than the school official, would have been inadmissible. See Stone v. Powell, 428 U.S. 465, 485-486 (1976); Lee v. Florida, 392 U.S. 378, 385-386 (1968). Indeed, research has revealed no case decided by this Court in which evidence that was improperly seized by a non-police governmental official was permitted to be used in a criminal proceeding by the prosecution.

Similarly, school officials must be deterred from arbitrarily searching students and then turning over any evidence of wrongdoing that they are lucky enough to find to the police on a "silver platter." Students' constitutional rights cannot be forfeited simply because of the whim of or a rash act by a school official, especially where the school official is under a duty imposed by a statute,¹¹ board of education directive, or otherwise, to turn evidence over to the police. Since it is clear that no other mechanism for enforcing Fourth Amendment rights in the school context is available,¹²

11. See Statutes cited in footnote 9, supra.

12. Damage awards generally have been barred by the good faith defense as the New Jersey Supreme Court observed, State in Interest of T.L.O., 94 N.J. 331, 349 (1983), and, in any event, are hardly preferable to suppression from the school officials' point of view. In addition, injunctive actions effectively have been barred by City of Los Angeles v. Lyons, ___ U.S. ___, 103 S.Ct. 1660 (1983).

only by applying the exclusionary rule to such non-police administrative searches can these juveniles be protected from such unwarranted invasions of their basic Fourth Amendment right to be free from unreasonable searches and seizures.

IV. THE BENEVOLENT CONCEPT OF IN LOCO PARENTIS CANNOT BE APPLIED TO DENY JUVENILES THE ESSENTIAL PROTECTIONS OF THE FOURTH AMENDMENT.

A few early lower court decisions improperly excluded students from the protection of the Fourth Amendment based upon the erroneous assumption that the doctrine of in loco parentis justified this exclusion. However, "(w)hile the doctrine of in loco parentis places the school teacher or employee in the role of a parent for some purposes, that doctrine cannot transcend constitutional rights." Jones v. Latexo Indep. School

Dist., 499 F. Supp. 223, 229 (E.D. Tex. 1980). Accord Picha v. Wielgos, 410 F. Supp. 1214 (N.D. Ill. 1976).

As this Court noted in In re Gault, 387 U.S. 1, 16 (1967) (due process rights cannot be denied on the basis of in loco parentis), in the past, in loco parentis and the phrase parens patriae "proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance."¹³

13. In In re Gault, this Court held that because a juvenile delinquency proceeding may lead to incarceration of the juvenile (as a search and seizure may lead to the juvenile proceeding), a juvenile has the constitutional right to due process of law and the privilege against self-incrimination. With regard to a juvenile's Fifth Amendment rights, this Court explained: "It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals,

(Footnote 13 continued on next page)...

In Kent v. United States, 383 U.S. 541 (1966), this Court held that juveniles could not be denied their constitutional rights in our juvenile courts under the concept of parens patriae, regardless of how benevolent the purpose may be. The role of these juvenile courts is virtually identical to

...(Footnote 13 continued from preceding page)

but not to children." 387 U.S. at 47. It would be similarly surprising if a child in or out of school could refuse to incriminate herself verbally but could not refuse to reveal physically incriminating evidence where probable cause to search does not exist.

This Court has recognized that juveniles also are entitled to other constitutional rights. See, e.g., In re Winship, 397 U.S. 358 (1970) (a juvenile cannot be convicted in a criminal prosecution, except upon proof beyond a reasonable doubt); Kent v. United States, 383 U.S. 541 (1966) (hearing for a juvenile must meet the essentials of due process and fair treatment); Gallegos v. Colorado, 370 U.S. 49 (1962) (confession taken from a juvenile violated his due process rights); Haley v. Ohio, 332 U.S. 596 (1948) (confession obtained from juvenile violated the juvenile's Fourteenth Amendment rights).

the role of our educational system insofar as both are responsible for molding the attitudes of and protecting our children. In addition, as in our schools today, although the juvenile courts then did not have the resources to cope with all the demands that were placed upon them, it was explained that the rights of the juveniles could not be compromised:

While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. There is much evidence that some juvenile courts. . . lack the personnel, facilities and techniques to perform adequately as representatives of the State in a parens patriae capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.

Id. at 555-556 (footnotes omitted).

In addition, the application of the in loco parentis doctrine to our present educational system ignores reality for two reasons. First, under this doctrine, public school officials do not acquire the same rights as parents have vis-a-vis their children. Second, public school officials act in concert with police officials by reporting findings of suspected criminal wrongdoing by juveniles in school and, as such, represent the interests of the police and State more than the parents or juveniles.

First, there can be no dispute that school officials do not have the same rights as parents with regard to juveniles. Under the concept of in loco parentis, a parent "may. . . delegate part of his parental authority during his life to the tutor or schoolmaster of his child; who is then in loco parentis and has such a portion of the

power of the parent committed to his charge." 1 W. Blackstone, Commentaries 453 (emphasis added).¹⁴ It cannot seriously be argued that parents have chosen to delegate to school officials all of their parental powers. In any event, the parents who would delegate the power to search their child and turn over the evidence to the police would certainly be the exception, not the rule.

It also is well settled that where a juvenile's constitutional rights are involved, a school official, as a governmental officer, does not have the same right to discipline the juvenile or otherwise impinge upon the juvenile's rights as the juvenile's parents. Thus, for example, parents may discipline their child for a peaceful, nondisruptive expression of the child's political beliefs,

14. Quoted in In re G.C., 121 N.J. Super. 108, 116, 296 A.2d 102, 106 (J. & D.R. Ct. 1972).

and may dictate whether or not the child prays or salutes the flag, whereas a public school official cannot. See, e.g., Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Similarly, in New Jersey, although parents may physically punish their child, a public school official is prohibited from inflicting corporal punishment on a student. See N.J. Stat. Ann. 18A:6-1 (West 1968).

Second, there can be no question that as in the present case public school officials routinely turn over to law enforcement authorities not only evidence of suspected wrongdoing by students, but also the students who are suspected of having committed the wrongful act. Indeed, several States require school officials to report evidence of

criminal activity to the police.¹⁵ Parents, however, do not have any such responsibility to and generally do not report wrongdoing by their children, even where the parents discover marijuana in their child's possession. Thus, although a cooperative effort by school officials and the police may be perceived as necessary to maintain discipline in the schools, it nevertheless firmly negates the fiction of in loco parentis and solidifies the role of public school officials as arms of the State.¹⁶

15. See Statutes cited in footnote 9, supra.

16. The fallacy of applying in loco parentis to the search of a juvenile by a public school official has been summarized in Buss, "The Fourth Amendment and Searches of Students in Public Schools," 59 Iowa L. Rev. 739, 768 (1974), as follows:

Insofar as in loco parentis sums up the peculiar school-student relationship and the school's related interest in searching students, it focuses almost entirely on protection of the other students and on coercive power over

(Footnote 16 continued on next page)...

Accordingly, in the context of searches and seizures, there is no reason to treat public school officials any different than other non-police governmental officials who have been entrusted with the safety and well-being of our society. School officials

...(Footnote 16 continued from preceding page)

the searched student. One of the things that makes in loco parentis such an erroneous phrase in this context is precisely the absence of a genuinely parental protective concern for the student who is threatened with the school's power. It is presumably a characteristic of the use of parental force against a child that the force is tempered by understanding and love based on a close, intimate, and permanent child-parent relationship. What so many of the courts persist in talking about as a parental relationship between school and student is really a law enforcement relationship in which the general student society is protected from the harms of anti-social conduct. As such, it should be subjected to law enforcement rules.

should be held to the same standards as these other governmental officials and juveniles should be free from searches by any of these officials unless there is probable cause for the search, whether the search is conducted in school or out of school.¹⁷ Picha v. Wielgos, 410 F. Supp. 1214 (N.D. Ill. 1976); State v. Mora, 307 So. 2d 317 (La.), vacated and remanded, 423 U.S. 809 (1975), on remand, 330 So. 2d 900 (La. 1976). See State v. Walker, 528 P.2d 113 (Or. Ct. App. 1974); People v. Cohen, 57 Misc. 2d 366, 292

17. The use of a standard lower than probable cause for the search of a juvenile in school has been severely criticized by commentators. See, e.g., Buss, "The Fourth Amendment and Searches of Students in Public Schools," 59 Iowa L. Rev. 739 (1974); Cotton and Haage, "Students and the Fourth Amendment: 'The Torturable Class,'" 16 U. Calif. D.L. Rev. 709 (1983); Reder, "School Officials' Authority to Search Students is Augmented by the In Loco Parentis Doctrine," 5 Fla. St. L. Rev. 526 (1977); Schiff, "The Emergence of Student Rights to Privacy Under the Fourth Amendment," 34 Baylor L. Rev. 209 (1982); Trosch, Williams and DeVore, "Public School Searches and the Fourth Amendment," 11 J.L. & Educ. 41 (1982).

N.Y.S.2d 706 (Dist. Ct. 1968); State v. McKinnon, 558 P.2d 781 (Wash. 1977)(Rosellini, J., dissenting). See also Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich 1975); Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971).

V. ALTHOUGH THE NEW JERSEY SUPREME COURT HELD THAT SCHOOL OFFICIALS DO NOT HAVE TO SATISFY THE PROBABLE CAUSE REQUIREMENT IN ORDER TO SEARCH A STUDENT, THE STANDARD ESTABLISHED BY THAT COURT AT LEAST WOULD CONSTITUTIONALLY PROTECT STUDENTS FROM ARBITRARY SEARCHES BY SCHOOL OFFICIALS

The New Jersey Supreme Court held that a school official, as a governmental agent, has the right to conduct a reasonable search for evidence when the school official "has reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order." State in Interest of T.L.O., 94 N.J. 331, 346 (1983).

This decision is supported by a significant number of other lower court cases, which have applied the same or a similar standard.¹⁸

The standard set out in the New Jersey Supreme Court's opinion, which is a lower standard than this Court's decisions indicate is required, attempts to balance the need of school officials to conduct reasonable searches of students in school with the right of students to be free from unreasonable

18. See, e.g., Horton v. Goose Creek Indep. School Dist., 677 F.2d 471 (5th Cir. 1982); Bilbrey v. Brown, 481 F. Supp. 26 (D. Or. 1979); In re W., 29 Cal. App. 3d 777 (Ct. App. 1973); In re C., 102 Cal. Rptr. 682 (Ct. App. 1972); State v. Baccino, 282 A.2d 869 (Del. Super. Ct. 1971); State v. F.W.E., 360 So. 2d 148 (Fla. Dist. Ct. App. 1978); People v. Ward, 233 N.W.2d 180 (Mich. Ct. App. 1975); Doe v. State, 540 P.2d 827 (N.M. Ct. App. 1975); People v. Singletary, 333 N.E.2d 369 (N.Y. 1975); People v. D., 315 N.E.2d 466 (N.Y. 1974); People v. Jackson, 319 N.Y.S.2d 731 (App. Div. 1971), aff'd, 284 N.E.2d 153 (N.Y. 1972); State v. McKinnon, 558 P.2d 781 (Wash. 1977); In re L.L., 280 N.W.2d 343 (Wis. Ct. App. 1979).

searches and seizures. The application of this standard also at least would prevent arbitrary and capricious searches by school officials and provide school officials with a common sense guideline for searching a student.

Certainly, school officials do not need, and undoubtedly would not want, the unbridled discretion to search students in any manner, at any time, and for any reason. Not only would it be the rare school administrator who would want to search a student without "reasonable grounds" to believe that the student possesses evidence of wrongdoing, but the United States Constitution mandates that at least such minimal protection be afforded to juveniles.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court apply the probable cause standard to the search and seizure of a juvenile by a school official or, in the alternative, affirm the decision of the New Jersey Supreme Court.

Respectfully submitted,

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ALEXANDER L. STEVAS
CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY,

Petitioner,

-VS-

T.L.O., a Juvenile,

Respondent.

**ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY**

REPLY BRIEF FOR PETITIONER

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No. 83-712

In The
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY,

Petitioner,

-vs-

T.L.O., a Juvenile,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

REPLY BRIEF FOR PETITIONER

The question presented by this petition, the opinions below, jurisdictional statement, listing of applicable constitutional and statutory authorities and statement of the case are all enumerated in petitioner's brief filed with this Court on January 14, 1984, and are, therefore, not repeated herein.

LEGAL ARGUMENT

POINT I

THIS COURT HAS JURISDICTION TO DECIDE THE ISSUE PRESENTED IN PETITIONER'S BRIEF.

In Point One of her response to petitioner's brief, respondent asserts that independent and adequate state grounds exist for the state court decision and, therefore, that this Court should dismiss the writ of *certiorari* as improvidently granted. On the issue of the application of the exclusionary rule to school searches, the opinion of the New Jersey Supreme Court relies solely on federal law. *State in the Interest of T.L.O.*, 94 N.J. 331, 463 A.2d 934 (1983). Hence, this Court properly has jurisdiction to resolve the issue concerning application of the exclusionary rule. *Michigan v. Long*, ____ U.S. ____, 103 S.Ct. 3469 (1983).

The New Jersey Supreme Court framed the issue as "whether the Fourth Amendment exclusionary rule applies to student searches made by public school administrators," *id.* at 336, 463 A.2d at 936, and concluded that "the issue is settled by the decisions of the [United States] Supreme Court." *Id.* at 341, 463 A.2d at 939. The state court, therefore, relied upon federal law and the decisions of this Court in "accept[ing] the proposition that if an official search violates constitutional rights, the evidence is not admissible in criminal proceedings." *Id.* at 341-342, 463 A.2d at 939.

Following this Court's granting of the State's petition for *certiorari* on November 28, 1983, respondent returned to the New Jersey Supreme Court to allege that the state court opinion in this matter was based upon unenunciated independent state grounds. Despite respondent's urging the New Jersey Supreme Court to issue a supplemental opinion clarifying this purported "ambiguity," the state court denied the motion for clarification.

As this Court held in *Michigan v. Long*, ____ U.S. at ____, 103 S.Ct. at 3476, jurisdiction will be exercised when a state court decision "appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." The New Jersey Supreme Court's holding in *State in the Interest of T.L.O.* is based on that court's interpretation of the

applicability of the Fourth Amendment to searches by school officials. The opinion framed the issue solely in terms of the Fourth Amendment and, in reaching the conclusion that the Fourth Amendment exclusionary rule did apply to school searches, the state court relied solely upon interpretations of the federal Constitution. Indeed, the only state cases to which reference is even made in this portion of the opinion deal exclusively with questions pertaining to the Fourth Amendment of the United States Constitution without mention of the state Constitution.¹ See *State in the Interest of T.L.O.*, 94 N.J. at 341, 463 A.2d at 938-939. Thus, respondent's assertion that the opinion is actually founded upon independent state grounds is refuted by the opinion itself.

Even were the opinion ambiguously worded in this regard, as respondent alleged in her unsuccessful motion to the state court for "clarification" of the opinion below, that fact would not divest this Court of jurisdiction. For, "it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940); accord, *Michigan v. Long*, ____ U.S. at ____, 103 S.Ct. at 3476.

Nor can it be contended that the New Jersey Supreme Court was unaware of the requisites of *Michigan v. Long*. In *State v. Bruzzese*, 94 N.J. 210, 463 A.2d 320 (1983), issued the same day as the opinion under review, the state court was careful to specifically note that "[c]onsonant with the United States Supreme Court's directive in *Michigan v. Long* ... we expressly observe that our decision rests, in part, upon state constitutional grounds independent of federal law." *Id.* at 217 n.3, 463 A.2d at 324 n.3 (citation omitted, emphasis supplied). Thus, had the state court intended to rely upon state constitutional grounds in reaching its decision in *T.L.O.*, it obviously would have expressly done so. Moreover, long before *Michigan v. Long* was decided, the New Jersey Supreme Court did not hesitate to expressly rely upon independent state grounds to reach the results it desired. See, e.g., *State v. Hunt*, 91 N.J. 338, 450 A.2d 952 (1982); *State v. Alston*, 88 N.J. 211, 440 A.2d 1311 (1981); *State v. Johnson*, 68 N.J. 349, 346 A.2d 66 (1975); *Robinson v. Cahill*, 62 N.J. 473,

¹ *In re Martin*, 90 N.J. 295, 312, 447 A.2d 1290 (1982); *State in the Interest of G.C.*, 121 N.J. Super. 108, 114, 296 A.2d 102 (J.D.R.C. 1972). In fact, the portion of *In re Martin* cited by the state supreme court quoted directly from opinions of this Court.

303 A.2d 273 (1973), cert. den. 414 U.S. 976 (1973). It is thus abundantly clear that, if the New Jersey Supreme Court had intended to rely on state grounds as the basis for its opinion in this case, it would have done so expressly.²

The issue before this Court is simply whether the Fourth Amendment exclusionary rule requires the suppression in a court proceeding of evidence of criminality uncovered by school officials acting in furtherance of their official duties. The state court opined that the decisions of this Court require suppression whenever an unreasonable official search occurs. As detailed in petitioner's brief previously filed with this Court, whether to exclude evidence must be determined by balancing the societal costs against any deterrent benefits of exclusion. In the case of a school search, the costs of application of the exclusionary rule far outweigh any possible derivative benefits; thus, the state court erred in failing to recognize that exclusion is not uniformly mandated by the Fourth Amendment.

Respondent details each state law citation referenced in the state opinion. Yet none of these state law references formed the basis for the New Jersey Supreme Court's holding on application of the exclusionary rule, and thus the references have no bearing whatsoever on the issue before the Court. The issue of what standard of reasonableness exists to govern searches undertaken by school officials in the pursuit of their duties is not before the Court.³ Hence, it is irrelevant that the state court opinion notes that seven state statutes

2 Furthermore, it was assumed by all parties to the proceedings in the state court, including those participating as *amici curiae*, that the state Constitution afforded no greater remedy than the federal Constitution under the circumstances of this case.

3 While recognizing that the standard of reasonableness governing a school search is not here at issue (respondent's brief at 31 n.18), respondent nevertheless notes that petitioner makes "no attempt to demonstrate that the search was legal." (Respondent's brief at 16). Although petitioner does not concede the illegality of the search undertaken below, it is fruitless to suggest that this Court alter the state court's error in applying the facts to the correct legal standard. Respondent also asserts that use of less than the probable cause-warrant requirement violates the Constitution. This is incorrect.

This Court has previously articulated a flexible standard for assessing the reasonableness of a search, balancing the need to search against the invasion which the search entails. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 559 (1979); *Camara v. Municipal Court*, 387 U.S. 523, 536-537 (1967). The majority of courts have applied the rationale of *Wolfish* and *Camara* to the school search situation and rejected the criminal case standard of probable cause. Such courts have determined, as did the state court in the present matter, that the balance requires application

exist to charge school officials with the duty to maintain order, safety and discipline in the schools. See *State in the Interest of T.L.O.*, 94 N.J. at 342-343, 463 A.2d at 940. It is similarly irrelevant that the need to insure order and thereby provide a "thorough and efficient education" and the individual's need for privacy are balanced by the state court in order to arrive at the standard to govern the reasonableness of school searches. 94 N.J. at 344, 346, 349, 464 A.2d at 940, 942, 943. Furthermore, it has no bearing on the single

(Footnote 3 Continued)

of a "reasonable grounds" standard. See *State in the Interest of T.L.O.*, 94 N.J. at 345 n.7, 346, 463 A.2d at 941 n.7, 941-942.

This standard makes far more sense as applied to the school search situation than does the probable cause standard espoused by respondent. See *In re G.*, 11 Cal.App.3d 1193, 1196-1197, 90 Cal.Rptr. 361, 362-363 (Ct. App. 1970). Indeed, the probable cause standard cannot effectively regulate decisions to search which result from attempts to enforce school regulations. A teacher suspecting, perhaps on the basis of anonymous information, that a student possesses a copy of an examination which has not yet been given, could not reasonably be required to meet a standard of probable cause before undertaking measures to correct the situation. Decisions to search made on the basis of suspected violations of school regulations cannot be separated, with a lower standard of reasonableness applied, from decisions based on suspected criminal violations, such as possession of a weapon on school grounds.

The school's interests in carrying out searches include the duty to provide a safe educational atmosphere free from disruption, and the absence of less intrusive alternatives to an immediate search. See *In re L.L.*, 90 Wis.2d 585, 600-601, 280 N.W.2d 343, 350-351 (1979). The student has a lessened expectation of privacy while in school because of the expected restraint exercised over students for security or discipline and the constant interaction among students; faculty and administrators. *Id.*; see also *Doe v. Renfrow*, 475 F.Supp. 1012, 1022 (W.D. Ind. 1979). In this regard, it is pertinent to note that N.J. Stat. Ann. 18A:37-1 (West 1968) provides that pupils in the public schools must comply with the school rules and submit to the authority of the school officials. This legal duty of students to submit to authority and obey rules contains an implied consent to a diminished expectation of privacy while in the school. Cf. *United States v. Biswell*, 406 U.S. 311 (1972), and *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (certain industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise). Indeed, the very authority which justifies the state in compelling students to attend school empowers it to subject students to the level of supervision and control necessary to ensure that the goals of the educational system will be fulfilled and that students' health and safety will not be jeopardized during their attendance. See *Ingraham v. Wright*, 430 U.S. 651 (1976). The same reasoning used in *Ingraham* to justify the use of corporal punishment of students would obviously apply to the less severe intrusion of a search.

issue before this Court that *N.J. Stat. Ann. 2A:4-60 (West 1952)* exists and provides that juveniles have the same rights and defenses available as do adults. We do not distinguish, for purposes of this case, between adult and juvenile students attending public schools.⁴

Prior to this Court's decision in *Michigan v. Long*, *supra*, when the Court was unsure about whether an opinion was based upon federal or state constitutional grounds, it would remand the matter to the state court and request a clarification. *See, e.g., Louisiana v. Mora*, 423 U.S. 809 (1976). More recently, the Court has refused to remand and, instead, has examined state law to determine whether state courts have used federal law to guide their application of state law or to provide the actual basis for the decision reached. *Michigan v. Long*, ___ U.S. at ___, 103 S.Ct. at 3475. *See Texas v. Brown*, ___ U.S. ___, ___, 103 S.Ct. 1535, 1538 (1983). Indeed, even where the federal and state grounds for decision may be intermixed, this Court has felt required to reach the merits. *See Oregon v. Kennedy*, 456 U.S. 667, 671 (1982). In *Michigan v. Long*, *supra*, the Court, however, observed that this *ad hoc* method of dealing with cases was unworkable "to achieve the consistency that is necessary." *Id.* at ___, 103 S.Ct. at 3475. This Court therefore determined to exercise jurisdiction unless a plain statement of an independent state ground appears on the face of the state court opinion.

In the instant case, the state court did not indicate by a "plain statement" that its decision was based upon state law, even though it was well aware of the requirements of *Michigan v. Long*. *See State v. Bruzzese*, 94 N.J. at 217 n.3, 463 A.2d at 324 n.3. Indeed, in its opinion in *T.L.O.*, the state court set forth federal law and the decisions of this Court as the basis for its holding that the exclusionary rule applies to evidence obtained in a search conducted by school officials. Furthermore, when confronted, by respondent's motion to clarify the state court opinion, with its "omission" of state grounds, the New Jersey Supreme Court declined to interject such an alternative basis for its decision. Hence, it is clear that this matter involves

⁴ Indeed, one of the two students considered in the state court opinion, Jeffrey Engerud, was 18 years of age at the time of the search. The significant factor justifying the state court's decision establishing the standard of reasonableness for school searches was the setting of the search, not the chronological age of the student. Once the state court determined that the searches were unreasonable, it deemed application of the exclusionary rule to be mandatory without reference to the student's age.

"on its face" an interpretation of federal law. This failure to conform to the dictates of *Michigan v. Long* vests this Court with jurisdiction. Since the state court did not indicate that its opinion rested on independent state grounds, this Court has properly exercised its jurisdiction in this matter.

POINT II

APPLICATION OF THE EXCLUSIONARY RULE WILL NOT SERVE TO DETER ANY IMPROPER SEARCHES BY SCHOOL OFFICIALS.

Respondent's brief repeatedly implies that the position taken by petitioner condones searches which are violative of the United States Constitution. This is obviously not the case. We agree that unconstitutional searches should not occur; the issue between the parties is simply whether suppression of probative evidence of criminality in a subsequent court proceeding can have any measurable deterrent effect upon the decision of educators to search their charges. We submit that the exclusionary rule is inappropriate precisely because, at least in the school search situation, it cannot achieve the deterrent ends which justified its creation.⁵

Respondent asserts that exclusion of evidence is constitutionally mandated when the state would use illegally seized evidence on its case-in-chief. This argument requires an identity between a violation of the Fourth Amendment and the decision to suppress, a position which has been rejected by the decisions of this Court.⁶ This

5 In fact, as respondent fails to recognize, there are two competing values. The suppression of evidence of criminality also must teach these same young persons the lesson that wrongdoers are not appropriately punished. While, of course, unconstitutional searches are unjust, justice is not served when, in Cardozo's famous words, "[t]he criminal is to go free because the constable has blundered." *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926). This latter value has been deemed subordinate to that of preventing unconstitutional searches; where, however, the deterrent value of the rule is not served, the injustice of permitting the criminal to go free is paramount.

6 Respondent posits a relationship between a lowered standard of reasonableness governing a search and invocation of the exclusionary rule, arguing that "the difference in the nature of the search has already been balanced and accommodated by the use of a standard less than probable cause." (Respondent's brief at 33). Application of the exclusionary rule in fact consists of two independent evaluations: (1) whether the search itself was "unreasonable" and (2) whether application of the rule is of any deterrent utility. These two evaluations are wholly unrelated. It is, of course, clear that, inversely, this Court has never even implied that the existence of the exclusionary rule would justify lowering standards to the extent that constitutional violations are permitted. Thus, respondent's argument regarding a balance between invocation of the exclusionary rule and lowered constitutional standards is fallacious.

Court has recognized that exclusion is not commanded in every case of illegality; rather, the Court must weigh the illegality against "the considerable harm that would flow from indiscriminate application of an exclusionary rule." *United States v. Payner*, 447 U.S. 727, 734 (1980). Indeed, it is established that "unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." *Id.*

If deterrence of unlawful searches will not be achieved by application of the rule, then to suppress evidence will only serve to benefit those students guilty of criminal acts, while according no protection to innocent students who are victims of illegal but fruitless searches. *See Irvine v. California*, 347 U.S. 128, 136 (1954). This anomalous result can be corrected only by utilization of effective methods of deterrence. In the school search situation not only is the exclusionary rule unworkable to achieve compliance with the Constitution, but there are other, non-judicial factors inherent in the system which can themselves generate deterrence of improper searches. As this Court recognized in *Ingraham v. Wright*, 430 U.S. 651, 670 (1977), the "openness of the public school and its supervision by the community afford significant safeguards" against official abuse. Most citizens are products of the public schools; many have children attending these schools. Hence, while unlawful police acts directed at those accused of crime may fail to evoke outrage in honest citizens who cannot identify with such a victim, the community-at-large has a substantial interest in halting any abuses by school officials. Some parent-teacher cooperation is a recognized fact in public school regulation, with parents having impact on the policies and behavior of school officials. Thus, school officials, being directly responsible and answerable to parents, cannot and will not be overly protective of "an overzealous subordinate." (Respondent's brief at 47).

Where it can serve no deterrent purpose, there is no reason to apply the exclusionary rule. This Court has established that suppression is not a personal constitutional right of one aggrieved by an unlawful search. *United States v. Calandra*, 414 U.S. 338, 348 (1974). The exclusion of evidence is not intended to remedy the particular wrong done by an unconstitutional search. *Id.* Thus, no student who has been unlawfully searched is "entitled" to have evidence of his criminality suppressed. Only if, by sacrificing the justice of conviction, future official overstepping can be avoided, is the exclusionary rule justified. It is clear that "a rigid and unthinking application of

the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime." *Terry v. Ohio*, 392 U.S. 1, 15 (1968).

As discussed in petitioner's brief previously filed with this Court, a school official's primary concern is education and he has no professional interest in the criminal justice process.⁷ Such an official may be faced with school exigencies, such as a risk of harm to the general student population, where "prompt action" is required and decisions must be "made in reliance on factual information supplied by others."⁸ *Wood v. Strickland*, 420 U.S. 308, 319 (1975). Regardless of whether any "evidence" may be inadmissible in a subsequent criminal trial, that official may properly be expected to perform his duty as he sees it, including undertaking a disciplinary search. In such circumstances, the deterrent goal of the exclusionary

7 This Court has only extended the suppression sanction to other than police agents when the government searchers were primarily engaged in a law enforcement function, albeit not necessarily enforcement of criminal laws. See *Michigan v. Clifford*, ___ U.S. ___, 104 S.Ct. 641 (1984) (arson investigators); *Michigan v. Tyler*, 436 U.S. 499 (1978) (fire and police officials jointly investigating cause of fire); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (inspection for safety hazards and violations of OSHA regulations); *United States v. Martinez-Fuerte*, 428 U.S. 543, 552 (1976) (interdicting flow of illegal entrants into the United States recognized as "formidable law enforcement problem" for border patrol); *See v. City of Seattle*, 387 U.S. 541, 543 (1967) (official inspection "to aid enforcement of laws" prescribing minimum physical standards for commercial premises); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (municipal health inspector searching for possible violations of city's housing code; Court noted that "[l]ike most regulatory laws, fire, health and housing codes are enforced by criminal process"); *Jones v. United States*, 357 U.S. 493 (1958) (search by federal alcohol agents investigating information that defendant was operating an illicit distillery).

8 School officials confront an exceedingly difficult task in discharging their educational duties in today's school system. The risks of violence for young adolescents in cities are greater while attending school than elsewhere; nearly 7,000 schools in this country are seriously affected by crime. Wyne, "The National Safe School Study: Overview and Implications," 2 (1979), ERIC #ED-175-112. Indeed, there is a clear relationship between declining standardized test scores for public school children and the fact that schools are not now safe environments in which to learn. Clark, "Violence in the Public Schools: The Problem and Its Solutions," 4 (1978), ERIC #ED-151-990. School administrators must have broad supervisory and disciplinary powers in order to protect their students so that the educational function may be fulfilled.

rule cannot be achieved.⁹

Indeed, it is precisely this necessity for school officials to exercise their judgment "independently, forcefully, and in a manner best serving the long-term interest of the school and students," which has led this Court to hold that such officials have a qualified immunity from civil liability. *Wood v. Strickland*, 420 U.S. at 320. If this Court, as indicated in *Wood v. Strickland*, has refrained from imposing liability on school officials in order that their honest judgment not be affected by considerations of personal liability, it is clear that a determination has been made that school officials are not to be dissuaded from such discretionary actions, including searches. Hence, even if application of the exclusionary rule could deter school officials from exercising similar honest judgment in a decision to search a student, it would be undesirable to so interfere with decision-making by those officials. Indeed, it would be anomalous to forego direct deterrence by providing personal immunity while at the same time attempt, by use of the exclusionary rule, to indirectly deter school officials from those same exercises of judgment inherent in carrying out their proper function.

The state court noted the propriety of the exercise of official judgment in this case when it stated:

We do not disparage the school officials' actions in these cases. They must often, as here, act on short notice based on the information they possess....

State in the Interest of T.L.O., 94 N.J. 331, 349, 463 A.2d 934, 943 (1983). That court, however, went on to view the exclusionary rule as mandated because the search was not, viewed retrospectively, proper. In this, the state court erred; it incorrectly deemed suppression to be a personal remedy for a student aggrieved by an unlawful search. This Court has declared otherwise and, hence, the state court judgment, suppressing evidence seized in a proper exercise of the school official's discretion, cannot stand.

9 Respondent and *amicus curiae* the American Civil Liberties Union both observe that several states have statutes requiring school officials to report school crimes to the police. (Respondent's brief at 20; ACLU brief at 32-33). The fact that teachers may be required by school regulation or even statute to report to police any crime occurring on school grounds, or evidence of a crime which is discovered, does not alter the analysis that the exclusionary rule cannot serve to deter searches by school officials. The function of school officials is not to investigate or prosecute crimes but, as is the proper obligation of any citizen, to report crimes if encountered. School officials do not undertake student searches in order to further prosecutions for criminal violations; that this may be the result is immaterial to a particular decision to search made in furtherance of school disciplinary objectives.

CONCLUSION

For the foregoing reasons, as well as the reasons expressed in petitioner's brief previously filed with this Court, the State of New Jersey urges this Court to rule that the exclusionary rule is inapplicable to school searches performed by school administrators and teachers and to reverse the decision of the New Jersey Supreme Court suppressing evidence.

Respectfully submitted,

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DATED: MARCH 20, 1984.

MOTION FILED

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No. 83-712

IN THE
Supreme Court of the United States
October Term, 1983

State of New Jersey,
Petitioners,

v.

T.L.O., a Juvenile,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

MOTION FOR LEAVE TO FILE A BRIEF
AS AMICUS CURIAE
IN SUPPORT OF REVERSAL

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IN THE
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State of New Jersey,
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T.L.O., a Juvenile,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

MOTION TO APPEAR AS AMICUS CURIAE
IN SUPPORT OF PETITIONER

The New Jersey School Boards
Association (NJSBA) moves this Court for
leave to appear as amicus curiae herein,
for the purpose of filing the attached
supplementary brief in support of the
Petitioner. Counsel for the parties have
not consented.

Amicus curiae, NJSBA, is a statutory,
nonprofit organization, comprised of
approximately 600 Boards of Education in

the State of New Jersey. N.J.S.A.

18A:6-45. The bylaws of the NJSBA cite as major objectives to encourage and aid all movements for the improvement of educational affairs of the state and the betterment and welfare of the children. The issues before this Court impact dramatically on individual boards of education and their employees and students. Resolution of the issues before this Court will dictate the actions which any board of education and its agents may take in efforts to maintain discipline and safety within the schools of their district.

By order of this Court on January 23, 1984, the NJSBA was permitted leave to file a brief as amicus curiae concerning the applicability of the exclusionary rule to searches conducted by school officials. The NJSBA maintains it is imperative that it be granted leave to participate and file a brief addressing the question of whether the assistant principal's actions violated

the Fourth Amendment in opening respondent's purse given the facts and circumstances of this case.

The applicability of a reasonable suspicion standard governing searches by school officials to which they must conform in maintaining safety and discipline in the schools is the issue this Court has elected to address. The NJSBA has adopted the following policy with respect to this issue:

The New Jersey School Boards Association recognizes that public school students have the constitutional right to be free from unreasonable searches and seizures by any person acting in an official capacity on behalf of a local school district. It is believed to be best for all parties concerned if the search of a student by a school official were permissible, only where the official had a reasonable suspicion that a school rule or a state law was being violated.
(emphasis supplied)

With this policy position as a base, amicus will urge the Court that given the facts and circumstances of this case the search of respondent's purse by the assistant

principle was reasonable.

Respectfully submitted,

Paula A. Mullaly

PAULA A. MULLALY
General Counsel
New Jersey School
Boards Association

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No. 83-712

IN THE
Supreme Court of the United States
October Term, 1983

State of New Jersey,
Petitioners,

v.

T.L.O., a Juvenile,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

AMICUS CURIAE BRIEF OF THE NEW
JERSEY SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS

The NJSBA is a statutory organization whose membership consists of 612 local boards of education in New Jersey. The NJSBA is empowered to "investigate such subjects relating to education in its various branches as it may think proper" and to "aid all movements for the improvement of the educational affairs of

this state." N.J.S.A. 18A:6-45 et seq.; 18A:6-47; See AFL-CIO v. State Federation of District Boards of Education, 93 N.J. Super. 51 (Ch. Div. 1966).

The presence of drugs and the relationship of drugs to crime in the schools presents a serious challenge to boards of education and their agents to maintain discipline and safety within the schools. Resolution of whether the Fourth Amendment was violated in this case will have far reaching affects upon the future actions of school administrators, and will in all likelihood dictate the actions school administrators will take in promoting safety and maintaining discipline.

Amicus is concerned that a finding by this Court that the assistant principal in this matter conducted an unreasonable search, and consequently violated the Fourth Amendment, will unduly restrict a school administrator's authority to enforce valid school regulations.

ISSUE PRESENTED FOR REVIEW

Whether the assistant principal violated the Fourth Amendment in opening respondent's purse in the facts and circumstances of this case?

ARGUMENT

THE SEARCH OF RESPONDENT'S PURSE WAS REASONABLE AND WAS NOT VIOLATIVE OF THE FOURTH AMENDMENT AS THE ASSISTANT PRINCIPAL HAD A REASONABLE SUSPICION THAT A SCHOOL REGULATION HAD BEEN VIOLATED.

The issue before this Court is a novel one, whether the assistant principal abridged respondent's right to be free from unreasonable searches as guaranteed by the Fourth Amendment to the United States Constitution.

The issue may be framed as follows: To what standard of reasonableness must a school official be held when searching a student? Three questions must be addressed to resolve this issue: (1) Does freedom from unreasonable searches apply to students in a school setting; (2) Is

the action of a school official state action for the purposes of the Fourth Amendment; and (3) What standard should be applied to assess the reasonableness of a school search.

The United States Supreme Court has extended to children the rights and protections of the United States Constitution. In Re Gault, 387 U.S. 1, (procedural due process); In Re Winship, 397 U.S. 358 (1970) (requiring proof beyond a reasonable doubt). Although these rights have been held to be not necessarily coextensive with those enjoyed by adults, (see Ginsberg v. New York, 390 U.S. 629 (1968)) it is well established that juveniles do not shed those constitutional rights when they enter the confines of the local school house. Tinker v. Des Moines School District, 343 U.S. 503 (1969). Although Tinker dealt specifically with students' First Amendment guarantee of free speech, the Court addressed constitutional

rights generally and did not limit its reasoning to the facts in that case. As a result, Tinker has been held by a number of jurisdictions to extend Fourth Amendment as well as First Amendment rights to students. Bilbrey v. Brown, 481 F. Supp. 26 (D.C.Ore., 1979); In re W., 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (D.Ct.App. 1973); In re C., 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (D.Ct.App. 1972); State v. Baccino, 282 A. 2d 869; (Del. Super, 1971); State v. F.W.E., 360 So. 2d 148 (Fla.D.Ct.App. 1978); People v. Ward, 62 Mich. App. 46, 233 N.W. 2d 180 (App. Ct. 1975); State in the Interest of G.C., 121 N.J. Super. 108 (J.D.R. 1972); State in Interest of T.L.O., 178 N.J. Super. 329, 428 A. 2d 1327 (J.D.R. 1980); Doe v. State, 88 N.M. 347, 540 P. 2d 827 (Sup.Ct. 1975); People v. Singletary, 37 N.Y. 2d 310, 372 N.Y.S. 2d 68, 333 N.E. 2d 369 (Ct.App. 1975); People v. D., 34 N.Y. 2d 483, 358 N.Y.S. 2d 403, 315 N.E. 2d 466 (Ct. App.

1974); People v. Jackson, 65 Misc. 2d 909, 319 N.Y.S. 2d 731 (App. Div. 1971); State v. McKinnon, 88 Wash. 2d 75, 558 P. 2d 781 (Sup. Ct. 1977); In re L.L., 90 Wis. 2d 585, 280 N.W. 2d 343 (Sup. Ct. 1979).

The Fourth Amendment to the United States Constitution protects "the right of the people to be secure in their persons, houses and effects against unreasonable searches and seizures." U.S.C.A. Const. Amend. 4. This right to be free from unreasonable searches extends to the States through the due process clause of the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 81 (1961). It is well established that the Fourth Amendment does not apply to searches conducted by private individuals. Burdeau v. McDowell, 256 U.S. 465 (1921).

The status of school officials as either government agents or private citizens has been debated in the courts. New Jersey, however, has been firm in its

assessment that school officials are government agents for purposes of the Constitution. Durgin v. Brown, 37 N.J. 189 (1962); Kaveny v. Board of Commissioners, Montclair, 69 N.J. Super. 94 (Law Division, 1961), aff'd 71 N.J. Super. 244 (App. Div. 1962); State in the Interest of G.C., supra. This assessment follows those reached in other jurisdictions on both the state and federal levels. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Tinker v. Des Moines School District, supra; Burnside v. Byars, 363 F. 2d 744 (5 Cir. 1966); Ferrell v. Dallas Independent School District, 392 F. 2d 697 (5 Cir. 1968); State v. Baccino, supra; People v. Jackson, supra.

The New Jersey Legislature too, has recognized that school officials are government agents for purposes of meeting the legislature's obligation to provide a thorough and efficient education to all school age children. N.J. Const., 1947,

Art. 8, Sec. 4, par. 1. Consequently boards of education have been given broad mandatory powers and duties necessary to meet the state's thorough and efficient education obligation, N.J.S.A. 18A:11-1 et seq.; while school administrators have been charged thereunder to maintain discipline, safety and order: authority to prevent disorderly conduct by pupils, N.J.S.A. 18A:25-2; students are required to submit to such authority, N.J.S.A. 18A:37-1.

Given the principles that the protections of the Fourth Amendment extend to students and that school officials are properly considered government officers, the question remains to what standard of reasonableness must school officials be held when searching a student.

As observed from its language, the Fourth Amendment does not prohibit all searches, only unreasonable ones. The United States Supreme Court in applying and interpreting the Fourth Amendment

determined there can be no ready definition of the term "unreasonable." Instead the Court has fashioned a threshold test, a balancing, wherein the interests of the government in conducting its search are weighed against the intrusion into one's individual right to privacy. Camara v. Municipal Court, 387 U.S. 537 (1967); See v. City of Seattle, 387 U.S. 541 (1968); Marshall v. Barlow, 436 U.S. 307 (1978). The balance has been determined to mean that when law enforcement officers conduct a search they are generally required to secure a warrant issued upon a showing of probable cause. Camara v. Municipal Court, supra.

Warrantless searches are permissible under appropriate circumstances. However, the probable cause requirement is a necessary predicate for such a search. Wong Sun v. United States, 371 U.S. 471 (1963). As is true with many rules, there have been exceptions to this strict

probable cause requirement. Under certain circumstances the United States Supreme Court has determined a search to be reasonable within the meaning of the Fourth Amendment upon a showing of less than probable cause. Terry v. Ohio, supra (stop and frisk); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (stopping of vehicles by roving border patrol); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (routine stops at permanent border checkpoints). Delaware v. Prouse, 440 U.S. 648 (1979) (random stop of automobile prohibited; must have reasonable articulable suspicion of a violation).

While school officials may be government officials subject to the proscriptions of the Fourth Amendment, they are not "law enforcement officers"; they are educators, untrained in and unfamiliar with the detection and the prevention of crime. They are concerned with the orderly operation of a school. The function of

that school is to educate children, both intellectually and socially, and to prepare them to function as independent, resourceful adults in society. This task requires a healthy, secure educational atmosphere. With the large number of students brought together during a school day, a learning environment can only be attained by maintaining order and discipline in the school. A delicate balance is required. Student activities and actions are monitored and controlled, but not suppressed. Certified school personnel are relied upon to implement rules and policies to protect other students' rights to be secure and to be left to pursue their educational goals. However, these rules and policies would be ineffective if school officials lacked the power to enforce them.

The high school assistant principal shares with the principal and other teachers the duty of maintaining an

orderly, disciplined atmosphere and protecting the rights of individual students. In People v. Overton, 20 N.Y. 2d 360, 229 N.E. 2d 596, 283 N.Y.S. 2d 22, (Ct. App. 1967), the court stated its view of the role assumed by school officials:

The school authorities have an obligation to maintain discipline over the students. It is recognized that, when large numbers of teenagers are gathered together *** their inexperience and lack of mature judgment can often create hazards to each other. Parents, who surrender their children to this type of environment, in order that they may continue developing both intellectually and socially, have a right to expect certain safeguards. [229 N.E. 2d at 597, 283 N.Y.S. 2d at 24]

In recognition of the responsibility of school officials to maintain school discipline and create a secure healthy learning environment many courts have adopted a reasonable suspicion standard, whether or not the jurisdiction perceives the official as a private person acting in

place of the parent¹, or as an agent of the government. See, e.g. Bellmier v. Lund, 438 F. Supp. 47 (N.D. N.Y. 1971); M. v. Bd. of Ed., 429 F. Supp. 288 (S.D. Ill., 1977); State v. McKinnon, supra. In Re Ronald B., 61 A.D. 2d 204, 401 N.Y. 2d 544 (N.Y. App. Div. 1978); Nelson v. State, 319 So. 2d 154 (Fla. Dist. Ct. App. 1975); Doe v. State, supra; State in the Interest of G.C., supra. This concept does not dismantle the safeguards afforded students by the Fourth Amendment rather it provides a less onerous standard than probable cause to provide for searches in the school context. It operates to fashion the

¹ Amicus notes with approval the New Jersey Supreme Court's movement away from the doctrine of in loco parentis. State in Interest of T.L.O., 94 N.J. 331, 340 n. 4 (1983)

standard of reasonableness imposed upon school officials prior to conducting a search. This emerging concept of reasonableness is properly identified as a "standard of reasonable suspicion." A school official given certain articulable facts which result in a reasonable suspicion on his part that a school policy has been violated or a criminal activity is afoot can conduct a search in order to safeguard the rights of other students and protect the safe and orderly operation of the school. Cf. Delaware v. Prouse, supra.

Recently a Wisconsin court analyzed the interests which allow this standard of reasonableness to satisfy the Fourth Amendment. These interests may be summarized as: (1) the State's interest in providing an education in "an orderly atmosphere which is free from danger and disruption"; (2) a student's lessened expectation of privacy because of the restraint exercised over students for

security and discipline; (3) "the realities of the classroom present few less intrusive alternatives to an immediate search for dangerous or illegal items or substances"

In re L.L., 90 Wisc. 2d at 600-601, 280 N.W. 2d at 350-357 (Sup. Ct. 1979).

In Doe v. Renfrow, 475 F.Supp. 1012 (N.D. Ind. 1979), a federal district court considered the absence of any normal or justifiable expectation of privacy on behalf of the students. The court determined that school officials had a reasonable right to conduct searches if necessary to protect students and safeguard the educational process. Concluding that students could not enjoy an absolute expectation of privacy while in the school because of the constant interaction among students, faculty, and school administrators, the court stated:

There is no question as to the right, and indeed, the duty of school officials to maintain an educationally sound environment

within the school. It is the responsibility of the school administrator to insure the proper functioning of the educational process...Maintaining an educationally productive atmosphere within the school rests upon the school administration certain heavy responsibilities. One of these is that of providing an environment free from activities harmful to the educational function and to the individual student. [475 F. Supp. 1012 at 1020] (N.D. Ind. 1979)

A student's right to be free from intrusion is not to be lightly disregarded; however, it must be subordinate to the orderly operation of the school. Support for this proposition comes from the United States Supreme Court as well as from state and federal courts. Tinker, supra. In Tinker, students were suspended for wearing black armbands to express their objection to the Vietnam War. The Supreme Court determined that the wearing of armbands was closely akin to "pure speech" and students could not be suspended for expressing non-disruptive objections to the Vietnam conflict. Protecting this student

activity, the Court noted that any conduct which materially disrupts classwork or involves substantial disorder or invasion of the rights of others is not immunized by the constitutional guarantee of freedom of speech. Tinker v. Des Moines School District, 343 U.S. at 513. This protection of school room decorum was also affirmatively recognized in Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L.Ed. 2d 725 (1975).

Tinker and Goss did not deal with students' Fourth Amendment rights, but the same recognition of school house decorum is appropriate when dealing with rights delineated under the Fourth Amendment. State in Interest of T.L.O., supra; State v. McKinnon, supra. Maintaining discipline in schools often requires immediate action and cannot await the procurement of a search warrant based on probable cause. A search of a student is reasonable if the school official has a reasonable suspicion

that there has been a violation of a school policy and the search is a necessary aid to the maintenance of school discipline and order. State in Interest of T.L.O., supra, State v. Baccino, supra; State v. Young, 234 Ga. 488, 216 S.E. 2d 586 (1975); In re State in Interest of G.C., supra; Doe v. State, supra; People v. D., supra; People v. Jackson, supra.

In Bilbrey v. Brown, 481 F. Supp. 26 (D. Or. 1979) a United States District Court held that searches may be conducted when a school official has a reasonable suspicion to believe a student has violated a school policy. It is clear that a school official should not be held to the same probable cause standard as a law enforcement officer. D.R.C. v. Alaska, 646 P. 2d 252 (Alaska Ct. App. 1982). To hold these officials to the limitations regarding searches imposed by the Fourth Amendment would place an unreasonable burden upon them.

Applying this standard to the facts before the court, it is clear that the search of the purse was reasonable. The assistant principal opened the student's purse upon a reasonable suspicion, if not probable cause, that the juvenile had violated school policy. The student was escorted to the office by a teacher who had observed the student smoking in a non-smoking area. The conduct of the student imposed a threat not only to the safety of the building and its occupants but also to the health of other students and staff. It infringed upon the rights of students to enjoy a safe and orderly environment in which to pursue their education.

Opening the student's purse was a reasonable attempt to obtain additional facts upon which to make an intelligent, fair determination regarding the claims of both parties. It preserved the school's interest in a safe, healthy and orderly

learning environment. The student's right to privacy was protected when she was provided with an opportunity to explain what had occurred prior to the search of her purse. It was only upon her denial of smoking in the face of the observation by the teacher, thereby creating a conflict requiring further investigative efforts, that the assistant principal found it necessary to open her purse.

School officials have a responsibility to protect the health, safety and welfare of not only the student involved but also the entire school population. This responsibility includes restricting smoking to specifically designated areas, as was done in the case sub judice, and the protection of the non-smoking student from the harmful and bothersome effects of cigarette smoke. These two concerns, coupled with the school's overall priority in maintaining discipline, safety and the integrity of the educational system,

satisfy the threshold required to sustain the reasonableness of the assistant principal's search of the purse. As stated herein, the standard to be applied in searches conducted by school officials is one of reasonable suspicion; that criterion was satisfied in the present case.

CONCLUSION

For the foregoing reasons, as well as the reasons expressed in amicus' brief previously filed with this Court, the NJSBA urges this Court to rule that the assistant principal did not violate the Fourth Amendment as he had reasonable suspicion to search respondent's purse under the facts and circumstances of this case; and further that the exclusionary rule should not be applied where the assistant principal conducted said search in good faith as discussed in our previous brief.

Respectfully submitted,

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No. 83-712

IN THE
Supreme Court of the United States
October Term, 1984

State of New Jersey,
Petitioner,

v.

T.L.O., a Juvenile,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

MOTION TO APPEAR AS
AMICUS CURIAE AND BRIEF AMICUS CURIAE
IN SUPPORT OF PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

State of New Jersey,
Petitioner,
v.

T.L.O., a Juvenile,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

MOTION TO APPEAR AS AMICUS CURIAE
IN SUPPORT OF PETITIONER

The National School Boards Association (NSBA) moves this Court for leave to participate as amicus curiae herein, for the purpose of filing the attached brief in support of the Petitioner. Counsel for the parties have not consented.

Amicus curiae, National School Boards Association (NSBA), is a nonprofit

federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

This case arises out of an effort by school officials to instill values in the students within their charge and to deal with discipline and the drug problem in the schools -- issues which are of major concern to school districts throughout the country, as well as to the parents of the children who are entrusted to the schools' care.

The Court has requested argument on the question of whether the assistant principal violated the Fourth Amendment in opening respondent's purse in the facts and circumstances of this case. As the dissent notes, New Jersey v. T.L.O., slip op. at page 2, the parties apparently agree that the standard set by the New Jersey Supreme Court "is a workable standard." Thus, it is unlikely that the parties, in addressing the Court's question, will differ in their analyses of the legal issues involved.

The precedent that will be set by this Court in the case at bar will affect the ability of school officials nationwide to carry out their appointed tasks -- educating students, instilling values and protecting them from harm while in school.

Since a majority of the Court has requested guidance on a broader issue than was initially argued by the parties, NSBA is in a unique position to provide that guidance given its special position as a representative of public schools.

Regardless of how the Court rules in this case, its decision will impact not only the criminal justice system, but will also have a direct impact on school districts throughout the country. Thus, the National School Boards Association urges this Court to grant it leave to present its views.

Respectfully submitted,

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NO. 83-712

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

State of New Jersey,
Petitioner,

v.

T.L.O., a Juvenile,
Respondent.

AMICUS CURIAE BRIEF OF
THE NATIONAL SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS

National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization

representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The problems of drugs and crime in the schools and of school discipline in general are of major concern to school districts throughout the country, as well as to the parents of the children who are entrusted to the care of the districts.

School boards across the country are concerned that decisions such as that of the court below will seriously undermine their ability to enforce school rules and discipline in a manner which will neither endanger the innocent nor result in life-long criminal stigmas for the guilty.

Amicus is also concerned about the

precedent in this case which, although technically involving only criminal standards, will be applied by lower courts to purely civil matters involving school discipline.

ISSUE PRESENTED FOR REVIEW

Whether the assistant principal violated the Fourth Amendment in opening respondent's purse in the facts and circumstances of this case.

ARGUMENT

I. INTRODUCTION

This Court has requested the parties to address the question: "Did the assistant principal violate the Fourth Amendment in opening respondent's purse in the facts and circumstances of this case?"

Resolution of that issue necessitates inquiry into two other questions: first, whether the respondent's Fourth Amendment rights were violated in the context of the school setting and second, whether her rights were violated in the context of a subsequent criminal proceeding. The answer to these two questions need not necessarily be the same.

The parties apparently agree on the answer to the second question, at least with regard to the standard used by the Supreme Court of New Jersey in determining whether the Fourth Amendment was violated. See dissent, New Jersey v. T.L.O., slip op at page 2.

The parties have not addressed the first question as to the standard to be applied to school searches in the context

of the school setting. It is the belief of amicus that the Fourth Amendment does not apply to searches conducted by school officials in the context of instilling values in the students who are in their charge and in enforcing school rules and maintaining order and discipline.

Because of the need to maintain discipline and protect children compelled by law to be present in the schools, amicus submits that the Fourth Amendment's standards should not be transplanted by the courts from the criminal enforcement context into the classroom.

Should the Court determine that the Fourth Amendment applies to searches in the context of the schools, the standard of "reasonableness" under which a school official's conduct is judged should be a

lesser standard than applies in the criminal context. The assistant principal's actions in the case at bar satisfied this lesser standard.

Amicus contends that a school official need only demonstrate that a rational basis existed for a search. Under this rational basis test, the school official should not be required to demonstrate a suspicion that a school rule has been violated but must show that the reason for the search was not arbitrary. Here, there was a rational basis for the assistant principal's search of the respondent's purse; he did not search her purse to determine whether she had violated a school rule but rather to show that the student had lied to him. The fact that there existed no general rule against smoking is irrelevant.

The rational basis test for a search satisfies the lesser standard of reasonableness for school searches, unlike the more stringent criminal standard of probable cause which requires sufficient indicia to support a belief that a crime has been committed. One of the major defects in the New Jersey Supreme Court analysis is that its lesser standard requires a showing that the school officials believed that a school rule had been violated. School officials should not be restricted to searches only for the purpose of determining a possible violation of a school rule.

Like other school officials and teachers, the assistant principal in the case at bar serves not only as an enforcer of school rules but also as an educator responsible for instilling

values in the students. It was in this latter capacity that he searched the respondent's purse. Because there was a rational basis to support the search, the search cannot be construed as arbitrary. While this reason may not be sufficient to justify a police officer searching a suspect, since the officer must have probable cause to believe the suspect has violated a criminal law, amicus submits that school officials should be permitted to make reasonable searches for valid reasons other than the possible violation of a school rule. See G. Rogister, A. Majestic & B. Williams, Search and Seizure in the Schools (1984).*

*Copies on file with the Clerk of the Court.

II. SCHOOL SEARCHES ARE A NECESSARY TOOL FOR MAINTAINING DISCIPLINE, ORDER AND SAFETY

Every state in this nation mandates, in one form or another, that children of certain prescribed ages attend school. P. Lines, "Private Education Alternatives and State Regulation," Education Commission of the States (1982). Faced with compulsory attendance laws, parents across the country entrust their children to the care of the schools, expecting the schools not only to educate but also to protect the students in their custody. Unfortunately, however, schools are being confronted by a rising tide of drugs, weapons, and disorderly conduct that makes their protective duties more and more difficult. School searches are a vital tool in the struggle to protect other students from dangerous

instrumentalities such as weapons and drugs, and to enforce school rules in a fair, certain and immediate fashion.

Recent estimates show that nearly three million school children may be the victims of crime each month. See Appendix A. Though students between the ages of 12 and 19 spend only about 25% of their waking time in school, it is estimated that 6% of all assaults and 40% of all robberies against this group occur while they are in school. National Institute of Education, Violent Schools--Safe Schools: The Safe School Study Report to the Congress 31-32 (1978). Ironically, it would almost appear that students are safer on the streets than in the classroom.

Nor are the effects of crime in the school limited to purely physical

factors. Students living in an atmosphere of fear cannot possibly receive the full benefits of their education. Surveys show that 4% of students may stay home from school each month because of their fear of becoming yet another victim of crime in the schools. See Appendix B.

Certainly, it is not the intent of amicus to convey the impression that schools are nothing more than armed camps. They are not. However, the efforts undertaken by schools attempting to alleviate the problem are continually being thwarted by judicial decisions such as that of the court below.

Schools are not only in the business of instilling book learning, but also of teaching moral values and discipline through the orderly, certain, and

immediate implementation of school rules. The student infringing school rules benefits little by having his or her conduct ignored and even less by having it referred to the criminal justice system. The ideal way to handle the matter is to show the students that their violations of school rules will lead to immediate and certain action against them by school authorities. They must be taught that rules are to be obeyed or immediate consequences will follow. Students are children, not adults, and need and want this type of certainty in their lives.

Unfortunately, today's criminal justice system is neither certain nor immediate. If anything, the criminal justice system teaches students that the law protects the wrongdoer. This is not

to say that the criminal justice system is invalid, especially when applied to accused criminals faced with possible loss of liberty. But the rules in effect for that system have no place in the public schools, which should operate in much the same manner as parents operate their disciplinary system at home.

According to one study, only three percent of the referrals to juvenile courts come from the schools. Report to the Nation on Crime and Justice 60 (1983). It is clear that schools are attempting to deal with the problem of crime internally, through the usual procedures available to them -- procedures which in the past have included searches of students' purses, pockets and lockers. They are acting not as surrogates for the criminal justice

system, but rather, as surrogates for the parents, teaching the difference between right and wrong:

In the school, as in the family, there exists on the part of the pupils the obligations of obedience to lawful commands, subordination, civil deportment, respect for the rights of other pupils and fidelity to duty. These obligations are inherent in any proper school system, and constitute, so to speak, the common law of the school. Every pupil is presumed to know this law Interest of L.L., 280 N.W.2d 343, 349, citing State ex rel Burpee v. Burton, 45 Wis. 150, 155 (1878).

Similarly, in the case at bar, the principal who searched the student was less interested in getting evidence to support a school disciplinary proceeding or a criminal investigation than in expressing his displeasure with the lie the student was telling him by claiming not to smoke although she had cigarettes

in her purse. The court below, unfortunately, concerned itself with criminal justice concepts of "plain view" and the fact that the principal, upon being told by the student that she didn't smoke, searched her purse and removed a package of cigarettes. Thus the court, using search standards established in the criminal setting, reasoned that the principal had no cause for his actions. The school's real interest, however, which went unrecognized by the court, was in instilling the virtue of telling the truth, not in obtaining evidence for a criminal prosecution. Thus, standards such as "plain view" should not even have been brought to bear.

It is important that courts understand that the education system is not a court, not a police station, and

that school officials are not law enforcement agents. Respect for the laws of the land and for the rules of the school is important for all students to learn. Strict enforcement of school rules is the surest and least obtrusive means for achieving respect, and the methods, including searches, should be left to the educators, not the courts.

III. THE FOURTH AMENDMENT WAS NOT INTENDED TO APPLY IN THE SCHOOL SETTING

Apart from the special needs of school officials to educate and protect students entrusted and compelled to be in their care, the history of the Fourth Amendment provides further support for the belief of amicus that the Fourth Amendment's prohibitions have no place in the classroom.

The Fourth Amendment was originally formulated in response to the general warrants in England and the writs of assistance in the Colonies, which gave the holder broad power, for life, to search and seize property at will. W. Ringel, Searches and Seizures, Arrests and Confessions 2-3 (1972). The first mention of the colonists' displeasure with then prevalent search and seizure practices appears in the writings of Samuel Adams, who in 1772 helped compile a report on the "Rights of the Colonists and a List of Infringements and Violations of Rights." The venom of the people against the writs and those executing them is eloquently expressed by Adams:

Thus, our houses and even our bedchambers are exposed to be ransacked, our boxes chests and trunks broke open, ravaged and

plundered by wretches whom no prudent man would venture to employ even as menial servants Those Officers may under colour of law and the cloak of a general warrant break thro' the sacred rights of the Domicil, ransack mens houses ... and with little danger to themselves commit the most horred murders. Adams, "The Rights of the Colonists and A List of Infringements and Violations of Rights," in 2 The Writings of Samuel Adams 350-69, (H.A. Cushing 1906).

James Madison's original proposal for the Fourth Amendment similarly concerned itself with warrants and the home, and did not even mention more general "unreasonable searches and seizures," but only that "the right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause" An amendment during House debate on the Bill of Rights added the language

relating to "unreasonable searches and seizures." 1 Annals of Congress 685-792 (August 17, 1789).

Originally, courts held that the Fourth Amendment's prohibitions did not apply to searches conducted by state officials, but only to federal authorities. Federal officials would thus attempt to circumvent search and seizure rules by having state authorities present to them "on a silver platter" evidence illegally obtained for use in federal court prosecutions, a practice which came to a halt with this Court's decision in Elkins v. United States, 364 U.S. 206 (1960). Ultimately, in Mapp v. Ohio, 367 U.S. 643 (1961), this Court held that the Fourth Amendment is incorporated into the Fourteenth Amendment and thus applies to state as

well as federal officials. Of course, all of these cases arose out of searches conducted by law enforcement officials for the purpose of obtaining criminal convictions.

Running throughout the cases interpreting the Fourth Amendment are several consistent threads. Though decisions interpreting the Fourth Amendment have extended its protections from the home to motor vehicles and other areas, in each instance, it can be argued that there is a high expectation of privacy, an expectation which does not exist in the school setting. Further, even cases which do not involve criminal justice officials such as policemen do involve law enforcement agents of one type or another. See, e.g., Camara v. Municipal Court, 387 U.S. 523 (1967).

These law enforcement officials, like police officers, are primarily devoted to the cause of detecting violations of the law, unlike school officials, for whom such activities are a mere adjunct to their primary duty of educating and caring for the children in their charge.

This "legislative history" and the distinctions drawn above are vital to an equitable resolution of the case at bar. This Court need not overrule its earlier decisions to hold here that there is no Fourth Amendment right in the schools where a search is conducted to enforce school rules and maintain order, rather than to hand over evidence to law enforcement officials "on a silver platter." It is clear that the Fourth Amendment was intended to protect accused persons from unreasonable criminal or

quasi-criminal procedures, not students being taught the difference between right and wrong.

IV. **CRIMINAL JUSTICE STANDARDS ARE NOT TRANSFERABLE TO THE SPECIAL SETTING OF THE SCHOOL**

Lower courts have attempted, as did the lower court in the case at bar, to adopt lesser standards of "reasonable" in determining whether a violation of the Fourth Amendment has occurred. However, the standards are difficult, if not impossible, to apply in the educational setting particularly since the standards are designed for the criminal context but must be applied in a civil context.

Several state courts have articulated a standard of "reasonable suspicion," a standard traceable to this Court's decision in Terry v. Ohio, 392 U.S. 1 (1968). Terry, however, involved

a criminal search, and attempts to apply such standards in the school discipline context often result in arbitrary and unpredictable decisions.

For example, in People v. Singletary, 37 N.Y.2d 311, 333 N.E.2d 369 (1975), a New York court upheld the search of a student as the result of a tip from another student who had identified drug offenders on five previous occasions. But the same court, in People v. D., 34 N.Y.2d 483, 315 N.E.2d 466 (1974), refused to find "reasonable suspicion" to justify a search on the basis of a "confidential source," and observations of the student making two brief trips to the bathroom, each time with two different students. Other inconsistent interpretations of "reasonable suspicion" can be found in

State v. Baccino, 282 A.2d 869 (Del. Super. 1971); W.J.S. v. State, 409 So.2d 1209 (Fla. App. 1982); State v. Peazell, 360 So.2d 907 (La. App. 1978); and L.L. v. Circuit Court of Washington County, 90 Wis.2d 585, 280 N.W.2d 343 (1979).

The court below cites a standard adopted in earlier cases, calling for school officials, before conducting a search, to consider "the child's age, history and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay, and the probative value and reliability of the information used as a justification for the search." New Jersey v. T.L.O., 463 A.2d 934, 942 (1983) (citations omitted).

Yet in applying the standard it discounts as unreasonable the fact that the principal had been observing Engerund for some time and that a teacher had seen T.L.O. smoking in the restroom, because these observations do not squarely fit into criminal justice standards on anonymous tips and probable cause.

Such standards would be well utilized if the school official was acting as a law enforcement officer. But school officials are primarily educators, not enforcers, and act to protect the other children in their charge, as well as to ensure that school regulations and order are maintained. If there is only a rumor that a child is carrying a gun -- that child should be searched immediately, regardless of whether the suspicion is reasonable as that term is used in the criminal context.

For example, in March of 1983, two third-grade students were found with a fully-loaded .45-caliber gun inside one of the students' desks. Miami Herald, 3/10/83, p. 1C. Should schools be prohibited from searching for weapons merely because they lack probable cause sufficient to obtain a criminal warrant? Of course not. No harm is done if the search is to no avail, but a child's life may have been saved if the search produces a weapon.

The mechanistic rules of the criminal context simply have no place in the setting of the school and the classroom. Rules such as the "clear view" doctrine, cited by the court below, and the "reasonable suspicion" standard which has been suggested as a substitute for probable cause, are all unnecessarily

rigorous. As stated by the Georgia Supreme Court in State v. Young, 234 Ga. 488, 496, 216 S.E.2d 586, 592 (1975): "Teachers and administrators must be allowed to search without hindrance or delay subject only to the most minimal restraints necessary to insure that students are not whimsically stripped of personal privacy and subjected to petty tyranny."

Teachers in a classroom are charged with the responsibility of maintaining order. Although one suspected of crime could not (without probable cause) be ordered by a police officer to empty his pockets or open her purse, surely our forefathers did not intend to require a teacher to meet criminal standards of probable cause or even "reasonable suspicion" in order to look through a

child's desk for the slingshot which sent a stone at another, or for the gum being chewed against school rules. Surely our forefathers did not intend the Fourth Amendment to require probable cause or reasonable suspicion before a principal could open a student's locker in the search for a gun reported by an anonymous tip to be there. Should our school officials be forced to wait until drugs are sold or a child is harmed before they are allowed to take action?

Just as school authorities view corporal punishment as a less drastic means of discipline than suspension or expulsion, Ingraham v. Wright, 430 U.S. 651, 657 (1977), so school authorities view the informal enforcement of school rules through searches, discussions with the student, and even suspensions and

expulsions as less drastic means of discipline than turning the schools into a criminal justice system with probable cause proceedings, formal advising of rights and calling in the police authorities, with the attendant permanent damage to the student such a process may entail. As one court, in praise of a school's efforts stated:

Without the intervention of law enforcement officers, and with little or no disruption of school activities or discipline, they conducted an informal investigation of the reported matter. Their information may not have proved to be valid, but their action insured that the adverse effect on the student's well-being, on his present and future emotional reaction to the event, as well as on the several societal interests concerned, would be kept at a minimum. In re G., 11 Cal. App. 3d 1193, 1197 (1970).

In discounting the notion that school officials be viewed as standing in

loco parentis rather than as officers of the state, the lower court notes that parents infrequently search their children and turn them over to the police for prosecution. New Jersey v. T.L.O., 463 A.2d at 938, n.4. Yet studies show that only about three percent of the referrals to juvenile courts come from the schools, the same percentage as are referred by parents. Report to the Nation on Crime and Justice 60 (1983).

The lower court in New Jersey v. Engerud, a companion case to T.L.O. mooted by the death of the student, noted that its opinion was not intended to "disparage the school officials' actions in these cases. They must often, as here, act on short notice based on the information that they possess. Such officials have immunity from damages for

claims resulting from their good faith judgments." The court cited Wood v. Strickland, 420 U.S. 308 (1975), to support its analysis on "good faith." However, other lower courts interpret the "good faith" test as applying only where the law in an area is unsettled, not where school officials subjectively believe their actions were correct. If the Fourth Amendment is applied to the schools, teachers and administrators will be subjected to damage actions where searches are held to be unreasonable, even though those officials believed in "good faith" that their actions were reasonable under the circumstances. In order to avoid such actions, school officials will simply stop making searches at all, which could have dire consequences for all children -- the guilty as well as the innocent.

Certainly, no school official would seriously argue, in light of this Court's decisions, that students shed their constitutional rights "at the schoolhouse gate." Tinker v. Des Moines Independent Community School District, 343 U.S. 503 (1969). But in the context of the classroom, students have different rights than those persons being processed through the criminal justice system. The convicted felon has rights under the Eighth Amendment; the student does not. Ingraham v. Wright, 430 U.S. 651 (1977). Even Constitutional guarantees which are not directed toward the criminal justice system, such as those arising under the First Amendment, are very much different in the schoolhouse setting. See Island Trees Union Free School District v. Pico, 457 U.S. 853 (1982).

Both precedent and common sense dictate a determination by this Court that portions of the Constitution, specifically the Fourth Amendment, are neither necessary nor applicable in the context of maintaining school discipline.

V. **STUDENT LOCKERS ARE NOT PROTECTED BY THE FOURTH AMENDMENT**

Although the companion case to this action, N.J. v. Engerud, is technically moot because of the death of the defendant, it is necessary to discuss that case in the context of any discussion of the Fourth Amendment's place in the schools. In that case, the court below determined that there was an "expectation of privacy" which the student possessed in his locker -- his "home away from home," -- and that school officials could therefore not search the

locker without the student's permission.

The search of the locker was based on an anonymous tip and on the subjective suspicions of the principal. The court applied the three prong test of Aguilar v. Texas, 378 U.S. 108 (1964), a criminal case, to determine the reliability of the tip, and held that it failed to meet that test. It is the position of amicus that it is simply inappropriate to require school officials attempting to maintain order and protect the well-being of the children entrusted to their care, to have to meet these types of tests, which are designed to protect the accused within the criminal justice system, not students in a school.

As noted above, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment

is directed" United States v. United States District Court, 407 U.S. 297, 313 (1971). The lower court opinion to the contrary notwithstanding, the public school student's locker is not his castle, nor is there a reasonable expectation of privacy in the school. Most other courts have held that since schools have control over students' lockers, there is no expectation of privacy in the lockers. See, e.g., Overton v. Rieger, 311 F. Supp. 1035 (S.D.N.Y. 1970); In the Matter of Christopher W., 105 Cal. Rptr. 775 (Ct. App. 1973); In re Donaldson, 75 Cal. Rptr. 220 (Ct. App. 1969); People v. Lanthier, 448 P.2d 625, 628 (Sup. Ct. Cal. 1971). See generally, Annot., Admissibility in Criminal Case of Evidence Obtained by Search Conducted by

School Official or Teacher, 49 A.L.R.3d 978, 979. The New Jersey Supreme Court, however, has said that such an expectation of privacy does not exist unless the school has a policy of regularly inspecting students' lockers. Thus, even if the school had a written policy to the effect that lockers could be opened at any time by school officials, it would probably still not be enough to meet the New Jersey court's standard, without a regular inspection practice.

VI. ALTERNATIVES EXIST TO THE FOURTH AMENDMENT TO PROTECT STUDENTS' CONSTITUTIONAL RIGHTS

It has been argued that to exempt schools from the application of the Fourth Amendment would leave students with no remedy for gross acts by school

officials against their person. That, of course, is not true. Amicus argues not for an exemption of the schools from the Constitution, but only from its Fourth Amendment, which was not intended to and indeed should not apply in the classroom. Other constitutional provisions would continue to protect students from severe abuses arising from searches. For example, where searches or punishment for infractions are discriminatory in application, the Equal Protection Clause may come into play. Where a particular search oversteps the bounds of necessity in a given situation or otherwise "shocks the conscience of the Court," the student may assert a violation of liberty interests as well as common law remedies. The value of such alternatives can best be demonstrated by decisions such as

Rochin v. California, 342 U.S. 165 (1951), a decision arising before the Fourth Amendment was found to apply to the states. In Rochin, this Court overturned a state conviction because the search (pumping the stomach of the defendant to recover morphine capsules) so "shocks the conscience" that it amounted to a denial of due process.

Thus, several lower court cases involving student searches might well have been successfully litigated under the due process clause. Strip searches of young children, where no danger to other children is involved, may be an example of conduct gross enough to raise constitutional implications. See, e.g., Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977). If, as stated by the court in Doe v. Renfrow, 631 F.2d 91, 92,

reh'g denied, 635 F.2d 582 (7th Cir. 1980), cert. denied, 451 U.S. 1022 (1981), "it does not require a constitutional scholar to conclude that [the search] is an invasion of constitutional rights of some magnitude," then the Rochin doctrine would clearly apply and there would be no need to resort to the Fourth Amendment to protect the student's rights.

Common law damage actions may also be an adequate remedy for gross violations resulting from searches of students' persons. In Ingraham v. Wright, 430 U.S. 651, this Court, in holding that the Eighth Amendment's proscription against "cruel and unusual punishment" does not apply to the schools, noted that the common law (and the state's statutory remedies)

adequately protects students against abusive imposition of corporal punishment in the schools. The rationale of the Court in Ingraham applies equally to an analysis of the Fourth Amendment:

The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner. Id. at 670.

VII. CONCLUSION

In a recent Gallup Poll survey respondents were asked to name the biggest problems facing their public schools. They chose lack of discipline (named by 25% of respondents) and use of drugs (named by 18% of respondents) as the top two problems in the schools. Phi Delta Kappan, Sept., 1983.

School board members, school

teachers, principals and other school officials are attempting to deal with this problem through internal procedures which will teach students, without imposing life-long criminal stigmas. Judicial decisions such as that below, threaten to erode the ability of local school officials to accomplish this mission by changing the long-standing relationship of student and teacher, and student and principal, from one revolving around a learning environment and the teaching of values, to one of policeman and suspect. "Courts should not 'intervene' in the resolution of conflicts which arise in the daily operations of school systems' unless 'basic constitutional values' are 'directly and sharply implicated' in those conflicts." Island Trees Union Free School District v. Pico, supra.

Clearly, the Fourth Amendment is not a constitutional value which is directly or sharply implicated where a school principal is acting in the capacity of educator and supervisor of school discipline policies in the manner described in the case below. Where school officials take on the role of surrogate law enforcement officer, a different rule might attach. That, however, is not the situation here. Here the school personnel were not taking on the role of "sovereign" where, according to Justice Rehnquist's analysis in Island Trees, supra, the constitutional duties may be different. Instead, the personnel were acting in the role of "government as educator."

There is a need, in order to protect innocent students as well as to teach the

guilty, for school personnel to have a free hand, within the bounds of good taste, to search the property of students within their charge. Such searches do not implicate Fourth Amendment considerations unless the school personnel are acting as surrogate law enforcement officers for the purpose of handing over evidence to the criminal justice system "on a silver platter."

Further, a finding that the Fourth Amendment does not apply to school administrative searches will not leave students unprotected. Should a search overstep the boundaries of good taste and "shock the conscience," other constitutional and common-law rights would be implicated and students would have the full protection of the laws to seek damages or other relief against

offending officials and the school district itself.

Recent "reports" and "studies" present simplistic solutions to the problem of crime in the schools, advocating more reporting by the school of criminal activity on school property, and implying that less effort should be made to advise students of their rights. That is certainly not what is advocated by amicus. Amicus believes only that the Fourth Amendment does not apply in the context of school personnel enforcing school rules and protecting the health and safety of students. Amicus continues to believe that students do, and should, have constitutional rights in the school; however, because of their youth, inexperience and their need for protection in the educational

environment, society must not treat children in school in the same manner as criminal suspects are treated in the criminal justice system.

Amicus submits that the assistant principal did not violate the Fourth Amendment for two reasons: first, because the search was conducted in the context of the school setting and, thus, the Fourth Amendment should not be held to apply; and second, even if the Fourth Amendment does apply in the school setting, the assistant principal's search of the student's purse was reasonable under the circumstance since he demonstrated a rational basis for carrying out the search.

Respectfully submitted,

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APPENDIX A

EXTENT OF CRIME AND VIOLENCE IN THE SCHOOLS

In the only nationwide study released to date on the incidence of crime and violence in our nation's schools, it was found that, at a minimum, two and one-half million students are the victims of crime in America's public schools in a typical month. "Safe Schools--Violent Schools," The Safe School Study Report to Congress,¹ a survey of over 4,000 schools, chronicles the extent of both student and teacher victimization in our schools. Among the findings:

- Eight percent of the nation's schools are seriously affected by crime, violence, and disruption.

¹ National Institute of Education, Safe Schools--Violent Schools, The Safe School Study Report to Congress (1978). The study was undertaken in response to Congress's request that HEW determine the extent and seriousness of crime in the schools.

- **Thirty percent** of all assaults and 40% of all robberies reported by people age 12-19 occurred in school, although students spend only about 25% of their active time in school.
- **One out of every 9** secondary school students, or 2.4 million have something worth more than \$1 taken from them in a month's time. Twenty percent of these thefts involved items valued over \$10.
- **One out of every 75** secondary school students, or over one-quarter million, are attacked at school each month. Forty-two percent of these attacks involve some injury to the student, and 4% of these are serious enough to require medical treatment.
- **One out of every 200** secondary school students have something taken from them by force, weapons, or threats in a typical month. Nine percent of these robberies involve injury to the student victim. Nearly one-quarter of these robberies involved losses over \$1.
- **Twelve percent** of secondary school teachers, or one out of every eight, reported having something worth more than \$1 stolen from them in a typical month. More than 20% of these thefts involved losses greater than \$10.
- About .5% or one out of every 200 secondary school teachers is attacked each month. Nearly

one-fifth of these attacks is serious enough to require medical treatment. A teacher has a five times greater chance than a student of being hurt if attacked.

- The odds of secondary school teachers having something taken from them by force, weapons, or threats at school in a typical month are 1 in 170. About one-fourth of these robberies involve losses of more than \$10.

APPENDIX B

CONSEQUENCES OF SCHOOL VIOLENCE

In addition to the far-reaching physical effects of school violence, wide ranging psychological consequences were also noted by the Violent Schools--Safe Schools study. Among these:

- **Twenty-two percent** of all secondary students reported avoiding some restrooms at school because of fear.
- **Sixteen percent** avoiding three or more places at school because of fear.
- **Twenty percent** of the students said they are afraid of being hurt or bothered at school at least sometimes.
- **Three percent** reported that they are afraid most of the time.
- **Four percent** actually stayed home from school in the previous month because they were afraid.

In addition to the anxieties suffered by the students, teachers also

expressed fear and trepidation arising out of school violence and hostile confrontations with students.

- **Twelve percent** of secondary school teachers said they had been threatened with injury by students at the school.
- **Twelve percent** of the teachers said they hesitated to confront misbehaving students because of fear.
- **Almost half** of the teachers reported that some students had insulted them or made obscene gestures at them in the last month.

***SOURCE** "Violent Schools--Safe Schools," The Safe School Study Report to the Congress, Vol. 1, p. 5 (1978).

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No. 83-712

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

THE STATE OF NEW JERSEY,
Petitioner,

v.

T.L.O., A JUVENILE,
Respondent.

On Writ of Certiorari to the
Supreme Court of New Jersey

MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF *AMICUS CURIAE* OF THE
NATIONAL ASSOCIATION OF
SECONDARY SCHOOL PRINCIPALS, AND
THE NEW JERSEY PRINCIPALS AND
SUPERVISORS ASSOCIATION
IN SUPPORT OF PETITIONER

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SUPERVISORS ASSOCIATION**

In accordance with Rule 36 of the Supreme Court of the United States, the undersigned organizations by their attorneys respectfully petition the Court for leave to file a brief *amicus curiae*, in the above titled action.

We seek the permission of the Court at this late date because of its decision on July 5, 1984, to hear reargu-

ment in the Fall term of an issue that was not briefed or argued in the term just concluded, namely:

Did the assistant principal violate the Fourth Amendment in opening the respondent's purse in the facts and circumstances of this case?

This question, unlike that originally certified to the Court, involves an important legal issue affecting public education in the United States, and an issue which has been the subject of considerable disagreement, if not actual confusion, in the lower courts. That issue is whether, or to what degree, the Fourth Amendment to the United States Constitution applies to searches of students conducted by public school personnel when acting under legitimate authority and direction of their local school boards. If the protections of the Fourth Amendment do so apply, it will also be necessary for the Court to define the standard applicable for the admissibility of evidence discovered in such searches, in school disciplinary proceedings as contrasted with its use in criminal and juvenile court proceedings.

Neither party has consented to the filing of a brief *amicus curiae*, and we have been informally advised that such consent would not be given. It is upon this advice that we are submitting this motion to the Court.

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July 30, 1984

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INTERESTS OF AMICI CURIAE

The National Association of Secondary School Principals (NASSP) is a voluntary association of approximately 35,000 administrators of public and private secondary schools throughout the United States. NASSP

was organized in 1916 to provide a spokesman for secondary school administrators and the formulation of all aspects of educational policy in the United States, and to improve programs for students enrolled in the schools. Although NASSP customarily does not seek to intervene in private litigation, it believes that this case involved the issues of such fundamental public importance as to make an expression of its views essential.

The New Jersey Principals and Supervisors Association (NJPAS) is affiliated with NASSP and is composed of approximately 4,000 building administrators and supervisors, including the Piscataway Administrators responsible for conducting the search giving rise to this appeal.

Both NASSP and the New Jersey Principals and Supervisors Association are committed to the improvement and strengthening of secondary education. They seek to be responsive to changes both in school environment, and in the role of education in society. Both the state and national organizations work in concert to promote research and development in curriculum standards and course contents. They also provide professional intern and improvement programs for individuals entering the field of public school administration.

In the course of their professional activities, NASSP and NJPSA believe that they have acquired substantial background and knowledge which may not be adequately provided by the parties to this case. The petitioners believe that such background knowledge and information is essential for a fair and expeditious consideration of the issues of this case, and that they represent a prospective and point of view which corresponds with the public interest.

INTRODUCTION

I

When the T.L.O. case was first certified to this Court, amici did not ask to file a brief because the specific questions certified to the court were, in our opinion, only indirectly related to the operation of the public schools and the specific responsibilities of our members, the principals and assistant principals of those schools. The specific issue presented to the court on appeal was solely whether evidence secured in a school administrative search was admissible in a criminal or quasi-criminal proceeding such as the juvenile court hearing which provided the basis for the appeal. The role of school administrators is to maintain and conduct an educational program. They have no other responsibility for law enforcement than do other citizens. In regard to juvenile court proceedings, their only role is that of witness and with specific regard to the issue of admitting evidence secured in administrative school searches in criminal or juvenile court proceedings, administrators would hold no professional opinion.

Now, however, the Supreme Court has asked a question to be addressed on rehearing which is of far greater relevance and importance to school principals. That question is:

Did the Assistant Principal violate the Fourth Amendment in opening the respondent's purse in the facts and circumstances of this case?

Before this question can be answered, one must first address another question:

Does the Fourth Amendment apply at all to student searches conducted by school administrators in the normal course of carrying out their responsibility for enforcement of school rules?

Only if this question is answered in the affirmative must the facts and circumstances be analyzed to see if

there was in fact a violation of the respondent's rights under the Fourth Amendment.

These amici believe there is considerable authority for the contention that the Fourth Amendment should not be applied to school searches conducted by school administrators, but they will not argue this issue here because it has already been well and adequately covered (in the *Brief of Amicus National School Boards Association*, Sections III and IV) already filed.

Even if this Court were to disagree, however, and the Fourth Amendment were held to apply in public schools, these amici would contend that the actions of the Assistant Principal should not be found to constitute a violation of the respondent's rights thereunder. It is to this specific point that amici will direct their argument.

SUMMARY OF FACTS

Amici will assume that the facts of this case are correctly stated in the opinion of the Supreme Court of New Jersey, and will not recount them in detail. In essence, they present a common high school situation in which a teacher reported to an assistant principal that she had observed two female students who had been smoking in a restroom in violation of a school rule. When interrogated by the assistant principal, one girl admitted that she was smoking, but the other, designated as T.L.O. in this case, not only denied the specific charge, but denied that she smoked at all.

Suspecting that the student was lying, the administrator then opened the student's purse which was on his desk, and saw a pack of cigarettes in plain view. Upon picking up the cigarettes, he saw rolling papers in the purse, also in plain view. Knowing that such papers were often used for making marijuana cigarettes, the administrator thereupon emptied the purse, and found a metal pipe of the kind used for smoking marijuana, empty plastic bags,

and one bag containing a tobacco-like substance. His search also revealed an index card recording the names of "people who owe me money" and two letters which, when read later, indicated that T.L.O. was dealing in drugs.

The assistant principal called the student's mother and the police, and T.L.O. was subsequently charged with delinquency based on possession of marijuana with intent to distribute. In juvenile court her motion to suppress the evidence uncovered in the school administrator's search was denied, and on appeal, the appellate division affirmed the denial of the suppression motion. While other issues were presented in the state court proceedings, they are irrelevant to the question now presented to this Court for argument.

ARGUMENT

I. WHATEVER FOURTH AMENDMENT RIGHTS CHILDREN MAY HAVE, THESE RIGHTS ARE NOT UNLIMITED, AND WITHIN THE CONTEXT OF THE PUBLIC SCHOOL, THEY MUST BE BALANCED AGAINST THE INTERESTS OF THE STATE IN PUBLIC EDUCATION.

This case presents to the Supreme Court for the first time the issue of the Fourth Amendment's protection of children as students in the public school, and it is certainly arguable that in this context, the Amendment should not apply at all. Amici will not present argument on this point, however, because it has already been well and fully presented to the Court by other amici at earlier stages of this litigation. (See in particular *Brief of Amicus National School Boards Association*, Sections III and IV.) Amici here will therefore direct their attention to the proposition that regardless of whether the Fourth Amendment does apply to students in public schools, that protection so afforded is not unlimited and must be balanced against the legitimate interests of the state in conducting programs of public education. This was well recognized by this Court in the celebrated case of *Tinker v.*

Des Moines Independent School District, 393 U.S. 503 (1969) itself upon which respondent heavily relies, the Court there saying that student rights under the First Amendment must still be, "applied in light of the special characteristics of the school environment." *Id.* at 506. See also *Sullivan v. Houston Independent School District*, 475 F. 2d 1071 (5th Cir.), *cert. den.* 414 U.S. 1032 (1973).

Indeed, both the majority and the dissenting minority of the New Jersey Supreme Court in their opinions in this case below, agree that respondent's rights under the Fourth Amendment are not unlimited, and must be balanced against the legitimate interests of the state, *State in Interest of T.L.O.*, 463 A. 2d 934, 940, and 945 (1983).

II. THE APPROPRIATE STANDARD TO BE APPLIED TO SEARCHES OF STUDENTS BY PUBLIC SCHOOL ADMINISTRATORS SHOULD BE LESS STRINGENT THAN THAT OF "PROBABLE CAUSE" REQUIRED TO BE SHOWN BY LAW ENFORCEMENT OFFICERS.

A great variety of approaches have been taken by the courts in trying to strike the appropriate balance between student privacy interests and the necessity for school officials to maintain adequate control over the school environment. Some have emphasized the role of the administrator, holding it to be qualitatively different from that of law enforcement officers. *R.C.M. v. State*, 660 S.W. 2d, 552 (Tex. Crim. App.; 1983). Others have focussed on the purpose of the search, distinguishing the enforcement of school rules from that of police in securing evidence for criminal prosecution, *Horton v. Goose Creek Independent School District*, 677 2d 482 (5th Cir.; 1982). Some courts have sought to make distinctions in the appropriate balance of interests based on the place searched, and the degree of intrusiveness into the student's privacy involved. *M.M. v. Anker*, 607 F. 2d 588 (2nd Cir.; 1979). But, regardless of the rationale, in the overwhelming ma-

jority of recent cases involving student searches conducted by school administrative personnel, if the Fourth Amendment was held to apply at all, the courts have agreed that the appropriate standard to be applied to school searches was less than the probable cause standard required of law enforcement officers. (See generally *Annotation, Admissibility in Criminal Case of Evidence Obtained by Search Conducted by School Official or Teacher*, 49 A.L.R. 3d 978; 1973, and *Comment: School Searches and the Fourth Amendment*, by Ivan B. Gluckman, 13 *West Education Law Reporter* 199 (1983).

Indeed, in the case at bar, again there is little meaningful disagreement on this point between the court's majority and the dissenting minority in the court immediately below. The dissenting opinion indicates a preference for the "reasonable suspicion" standard rather than the "reasonable grounds to believe" standard applied by the court's majority. We would concur, if only because the former standard has already been applied in many cases (see listing in dissent *supra* at p. 944) and because it has been applied by this court in at least one case, *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975). In addition, it is confusing to introduce a new standard without clearly delineating how it may differ from the very similarly worded "reasonable suspicion" standard. But the important point is that, in either case, administrators would be held to a lower standard than that of law enforcement authorities in recognition of the different responsibilities they carry, and the purposes of the searches they conduct.

That purpose should be, and was in the case at bar, the enforcement of school rules, not the enforcement of criminal statutes. The fact that the product of the search included contraband which subsequently became the basis of a criminal or quasi-criminal prosecution should be totally irrelevant to the legitimacy of the original search, or the use of materials uncovered in it for school disciplinary purposes.

Conversely, the admissibility of the evidence uncovered in the search by a school administrator in a subsequent criminal or quasi-criminal action is also a separate question which should be evaluated on a different basis, and might well reach a different result. While this is a legitimate issue in the case at bar as originally certified to the Court, it is outside of the scope of the present question presented by the Court for reargument.

III. THE SCHOOL REGULATION UPON WHICH PETITIONER'S ADMINISTRATOR BASED HIS ACTIONS REGARDING RESPONDENT T.L.O. WAS A VALID ONE WHICH ADMINISTRATOR HAD A RESPONSIBILITY TO ENFORCE.

One possible basis for attacking the legality, if not the constitutionality, of the administrator's search, would be if he lacked the proper authority to make such a search. But there seems little if any basis for such a claim in this case. As pointed out by the court in the state supreme court opinion below, (p. 940):

The Legislature has specifically charged school officials to maintain order, safety and discipline. The statutes give them authority to prevent disorderly conduct by pupils, N.J.S.A. 18A:25-2, and students are required to submit to such authority, N.J.S.A. 18A:37-1. Specifically, school officials have power to suspend pupils for illegal possession or consumption of drugs or alcohol, N.J.S.A. 18A:37-2(j), for assaulting teachers, N.J.S.A. 18A:37-2.1, or for other good cause. See N.J.S.A. 18A:37-2,-4. Other statutes allow them to deal specifically with pupils who are under the influence of drugs or alcohol, N.J.S.A. 18A:40-4.1 (principal shall notify parent); N.J.S.A. 18A:35-4a (board of education shall establish policies and procedures for evaluating and treating alcohol users). Finally, N.J.S.A. 18A:6-1 grants specific power to seize weapons or other dangerous items and to quell disturbances.

[3-5] Taken together, these statutes yield the proposition that school officials, within the school setting,

have the authority to conduct reasonable searches necessary to maintain safety, order and discipline within the schools. This holding comports with prevailing decisional law.

Indeed, in light of the plenitude of legislative instruction, administrative employees of a school district charged with disciplinary responsibilities might well be found to be delinquent in their duties if they failed to take whatever steps were reasonable to find out whether disciplinary rules established to protect students and the educational process were being violated. One such step which may be necessary as well as appropriate to such an investigation is a search.

IV. THE ADMINISTRATOR'S SEARCH OF RESPONDENT T.L.O.'S PURSE WAS REASONABLE UNDER ALL OF THE FACTS AND CIRCUMSTANCES, AND NOT IN VIOLATION OF ANY RIGHTS WHICH THE STUDENT MAY HAVE HAD UNDER THE FOURTH AMENDMENT.

If the legislature of New Jersey clearly granted authority to school officials to establish reasonable regulations for the control of student conduct in the state's public schools, and if the district's administrators are responsible for their proper enforcement, then the only possible avenues for attacking the administrator's behavior in this case would be to contend: (1) that the specific regulation involved was not itself reasonable; or (2) that the administrator's actions in seeking to carry it out were unreasonable.

As stated succinctly by the dissenting justices below, "No one has questioned the validity of the school regulations here involved, as it concerns the prohibition of smoking in the school. Indeed, the regulation is fully and clearly supported by a state statute requiring public schools to display signs indicating that smoking is prohibited in the building except in designated areas."

(N.J.S.A. 26:3D-18 cited in the dissent in paragraph 2 of its opinion.) School officials therefore had a right, and indeed, a responsibility for enforcing the district's regulation, and in order to do so, it was necessary to investigate any reported violation of it.

The only remaining question which would then require an affirmative answer in order to validate the administrator's actions in this case would be: Were his actions taken in order to investigate the reported infraction of the school's rules so unreasonable as to constitute a violation of the respondent's constitutional rights? In order to answer that question all of the known facts and circumstances of the incident must be examined closely.

An eye-witness report was given to the assistant principal by a member of the school's faculty that T.L.O. and another female student had been observed smoking in a location in which smoking was not permitted under the school district's regulation. The administrator was obligated to investigate this report. He did so in the only way possible, by interrogating the accused students. One admitted her infraction, but the other, respondent in this case, did not, denying not only the specific accusation, but the allegation that she smoked at all.

Faced with this denial, we would respectfully suggest that the administrator had but one possible way to check on T.L.O.'s veracity, and that was to see if her purse contained cigarettes or evidence of the presence of some such smoking material. It was for this purpose that the assistant principal thereupon opened the student's purse and discovered a package of cigarettes which, according to the statement of facts by the dissenting judges, "sat on top, plainly visible."

To whatever degree the administrator's action might have interfered with the privacy of the respondent student, that action must be evaluated in light of all of the circumstances, including most notably the absence of any

other method of deciding whether the report of the teacher or the denial by the student was to be believed. It has been suggested by respondent's counsel in oral argument before this Court that the administrator could have taken the word of the teacher and disciplined the student without attempting verification of the report by opening her purse. We would agree that legally such an action would have been sustainable. But as a matter of educational administration, we would submit that the administrator's action was far superior. Taking the teacher's word against that of the student without even seeking other corroboration as a basis for school disciplinary action is a major source of school-student friction, and can hardly be taken as a prescription for teaching respect for students as citizens.

The other major factor to consider, among those delineated by the New Jersey Supreme Court itself, is the intrusiveness of the search (p. 942). We would submit that the mere opening of respondent's purse constituted a very minor intrusion into her privacy, especially under all of the facts and circumstances of this case. Whether those facts would have justified a more thorough search of the purse's contents merely for the purpose for which it was opened is another question, but one that is not presented here. The further search that did occur was occasioned instead by the evidence of much more serious violations not only of school rules but of criminal law. This evidence being in plain view, further search and confiscation of the suspect materials would have been justified even by law enforcement officers. There should, therefore, be no question that the more thorough search of respondent's purse by a school administrator was perfectly legal and justifiable.

On July 5, 1984, the same day that this honorable Court requested reargument in the case at bar, the Court handed down opinions in two cases involving searches by police officers. *United States v. Leon*, — U.S. — (1984) and *Massachusetts v. Shepard*, — U.S. —

(1984). In its decisions, the Court held that an exception to the exclusionary rule should apply where these officers conducted searches that might otherwise have violated the Fourth Amendment, in good faith. If good faith on the part of law enforcement officers provides such an exception to the Fourth Amendment, certainly the same exception should apply to searches by school administrators whose duties and purposes do not even include the enforcement of criminal law with its much greater penalties.

V. THE SUPREME COURT OF NEW JERSEY ERRED IN SUBSTITUTING ITS JUDGMENT FOR THAT OF THE ORIGINAL TRIER OF THE FACTS, THE JUVENILE AND DOMESTIC RELATIONS COURT.

The Supreme Court of New Jersey accepted the standard applied by the lower state courts for evaluating the authority of school administrators in conducting administrative searches of students in their schools. It reversed the judgment of those lower courts, both the original trier of the facts and original court of appeal, only on the ground that the actions of the assistant principal did not meet the requirements of the legal standard applied.

We would submit that, as a basic principle of administrative law, this ruling of the Supreme Court of New Jersey is in error.

This Court needs no citations of authority for the principle that the findings of fact as well as the interpretation of those facts by a trial court are to be respected unless there is clear evidence that the conclusions drawn from the facts were totally unreasonable. In the case at bar this principle is supported further by the so-called "two-court rule" which states that a second level appellate court is to limit its review to questions of law when the first level appellate court sustained the trial court. *American Jurisprudence 2d*, Appeal and Error, Sec. 828. In light of the disagreement among the members of the New Jersey Supreme Court the conclusions of the trial court

were certainly not so unreasonable as to justify reversal by the second level state court of appeal.

As a matter of administrative law, too, it would seem that the action of the New Jersey Supreme Court is in error. It is not the role of the courts to substitute their judgment for that of administrators charged with making decisions based upon their professional knowledge and experience. This general admonition against such exercise of judicial power was most clearly applied in the educational context when, speaking for this Court, Justice White warned less than ten years ago:

It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. . . . The system of public education that has evolved in this nation relies necessarily upon the discretion and judgment of school administrators and school board members. . . ."

Wood v. Strickland, 420 U.S. 308, 326 (1975).

Certainly this reasoning applies equally well to our state courts.

CONCLUSION

For the reasons given above, the decision of the Supreme Court of New Jersey that the actions of petitioner's administrators were in violation of respondent's Fourth Amendment rights should be reversed.

Respectfully submitted,

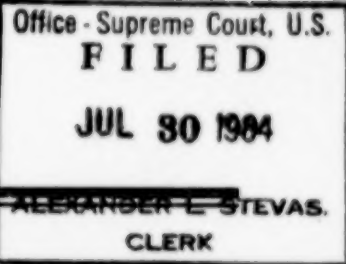
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No. 83-712



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY,

Petitioner,

v.

T.L.O., a Juvenile,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of New Jersey

**SUPPLEMENTAL BRIEF FOR
PETITIONER UPON REARGUMENT**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-712

STATE OF NEW JERSEY,

Petitioner,

v.

T.L.O., a Juvenile,

Respondent.

On Writ Of Certiorari To The
 Supreme Court Of New Jersey

**SUPPLEMENTAL BRIEF FOR
 PETITIONER UPON REARGUMENT**

STATEMENT OF THE CASE

On the morning of March 7, 1980, a teacher of mathematics at Piscataway High School entered the girls' restroom and found the juvenile-respondent T.L.O. and a girl named Johnson holding what the teacher perceived to be lit cigarettes. (MT20-1 to 25).¹ Smoking was not permitted and the girls were thus committing an infraction of the

¹ "MT" refers to the transcript of the motion to suppress heard on September 26, 1980;

"T" refers to the transcript of the trial on March 23, 1981, the transcript of the juvenile's plea of guilty to other complaints on June 2, 1981, and the transcript of sentencing on January 8, 1982, all contained in one volume.

"AT" refers to the transcript of the previous argument of this case before this Court on March 28, 1984.

school rules. The girls were taken to the principal's office where they met with Theodore Choplick, the assistant vice-principal. (MT21-1 to 3; MT21-24 to 22-11; MT31-18 to 20; MT33-20 to 34-10).

Mr. Choplick asked the two girls whether they were smoking. Miss Johnson acknowledged that she had been smoking, and Mr. Choplick imposed three days attendance at a smoking clinic as punishment. (T49-24 to 50-7). T.L.O. denied smoking in the lavatory and further asserted that she did not smoke at all. (MT27-10 to 17). Mr. Choplick asked T.L.O. to come into a private office. (MT27-14 to 21; MT30-22 to 31-17).

Once inside this office, Mr. Choplick requested the juvenile's purse, and she gave it to him. (MT27-24 to 28-7). A package of Marlboro cigarettes was visible inside the purse. (MT28-9 to 11). Mr. Choplick held up the Marlboros and said to the juvenile, "You lied to me." (MT28-14 to 18). In plain view next to the Marlboros was a package of "Easy Roll" rolling papers for cigarettes. (MT28-19 to 24; T16-12 to 14). Upon being confronted with the rolling papers, the juvenile denied that they belonged to her. (MT29-5 to 24).

On the basis of his experience, Mr. Choplick understood possession of rolling papers to indicate that a person is smoking marijuana and looked further into the purse. There he found marijuana, other drug paraphernalia and documentation of T.L.O.'s sale of marijuana to other students. (MT29-7 to 9; T15-18 to 16-1). Mr. Choplick called T.L.O.'s mother and then notified the police. (MT41-5 to 13).

T.L.O.'s mother acceded to a police request to bring her daughter to police headquarters for questioning. (T18-12 to 18). Once at headquarters, T.L.O. was advised

of her rights in her mother's presence and signed a *Miranda*² rights card so indicating. (T20-3 to 21). The officer then began to question T.L.O. in her mother's presence. (T23-4 to 6). T.L.O. admitted that the objects found in her purse belonged to her. She further admitted that she was selling marijuana in school, receiving \$1 per "joint," or rolled marijuana cigarette. T.L.O. stated that she sold between 18 and 20 joints at school that very morning, before the drug was confiscated by the assistant vice-principal. (T22-2 to 15). A delinquency complaint charging the juvenile with possession of marijuana with the intent to distribute, contrary to *N.J. Stat. Ann.* 24:21-19(a)(1) (West 1940 & Supp. 1983) and *N.J. Stat. Ann.* 24:21-20(a)(4) (West 1940 & Supp. 1983), was then drafted and filed the same day. Because the offense occurred on school property, the school, in accordance with its published procedures, administratively suspended the juvenile for ten days.

On September 26, 1980, the state trial court considered and denied the juvenile's motion to suppress evidence. *State in the Interest of T.L.O.*, 178 *N.J. Super.* 329, 336-343, 428 A.2d 1327, 1330-1334 (J.D.R.C. 1980), *aff'd o.b.* in part and *rev'd* on other grounds in part, 185 *N.J. Super.* 279, 448 A.2d 493 (Super. Ct. App. Div. 1982). On March 23, 1981, the juvenile was tried and, at the conclusion of trial, she was found guilty and adjudicated delinquent. (T69-6 to 8). On January 8, 1982, T.L.O. was sentenced to probation for one year with the special condition that she observe a reasonable curfew, attend school regularly and successfully complete a counselling and drug therapy program.

On February 11, 1982, the juvenile filed a Notice of Appeal to the Superior Court of New Jersey, Appellate

² *Miranda v. Arizona*, 384 U.S. 436 *reh'g denied* 385 U.S. 890 (1966).

Division. On February 25, 1982, the appellate court stayed execution of the sentence pending final disposition of T.L.O.'s appeal. On June 30, 1982, the Appellate Division, with one judge dissenting, affirmed the denial of the motion to suppress evidence seized in the search of the juvenile's purse, for the reasons expressed in the trial court's reported opinion. *State in the Interest of T.L.O.*, 185 N.J. Super. 279, 448 A.2d 493 (Super. Ct. App. Div. 1982).

On July 16, 1982, the juvenile filed a Notice of Appeal as of right to the Supreme Court of New Jersey. On August 18, 1983, the State Supreme Court held that the Fourth Amendment exclusionary rule applies to searches and seizures conducted by school officials of students in public schools. *State in the Interest of T.L.O.*, 94 N.J. 331, 463 A.2d 934 (1983).

In that same opinion, the New Jersey Supreme Court decided the companion case of *State v. Engerud*, involving a search of a high school student's locker pursuant to information that the student was selling controlled dangerous substances in the school. Shortly after the date of the decision, the defendant, Engerud, was killed in a motorcycle accident, thus mooted any petition in that case.

On October 7, 1983, the State of New Jersey filed a petition for *certiorari* with this Court. *Certiorari* was granted on November 28, 1983. On March 28, 1984, this case was originally argued before the Court. Thereafter, on July 5, 1984, the Court restored the case to the calendar for reargument stating:

This case is restored to the calendar for reargument. In addition to the question presented by the petition for writ of *certiorari* and previously briefed and argued, the parties are requested to brief and argue the following question:

Did the assistant principal violate the Fourth Amendment in opening respondent's purse in the facts and circumstances of this case?

The present brief is submitted in response to this order.

SUMMARY OF ARGUMENT

The Fourth Amendment does not apply to school searches conducted solely by school teachers and school officials. Assuming, however, that the Fourth Amendment does apply to school searches, the search of respondent's purse was "reasonable" and hence constitutionally justified. Society has substantial interests in an educated populace, in the security of its educational facilities and in the welfare of juveniles. In contrast, a juvenile has a diminished expectation of and interest in privacy in a school environment, because of the expected restraint necessary for security or discipline and the constant interaction among students, faculty and administrators. The foregoing demonstrates that a student has at most a minimal expectation of privacy in personal effects brought into school. In balancing the substantial interests of society in conducting a search of such articles and the students' minimal expectation of privacy therein, a search of such articles is "reasonable" if the searching official has a reasonable or articulable basis for suspecting that they contain evidence of a school infraction. The searching school official in this matter had such a basis to believe that evidence of a violation of a school regulation would be found in respondent's purse.

LEGAL ARGUMENT

The Search Of The Juvenile's Purse Did Not Violate The Fourth Amendment To The United States Constitution.

The State of New Jersey petitioned for *certiorari* in this case on the question whether "the Fourth Amend-

ment's exclusionary rule applies to searches made by public school officials and teachers in school." This Court granted the State's petition and the issue was briefed and argued. On July 5, 1983, the Court ordered that:

This case is restored to the calendar for reargument. In addition to the question presented by the petition for writ of certiorari and previously briefed and argued, the parties are requested to brief and argue the following question:

Did the assistant principal violate the Fourth Amendment in opening respondent's purse in the facts and circumstances of this case?

In its original petition and brief, petitioner addressed the inapplicability of the exclusionary rule to evidence of crimes discovered in school searches conducted by school personnel. Petitioner did not stress the applicability of the Fourth Amendment to school searches, the proper standard for school searches or the correctness of the New Jersey Supreme Court's determination that the search in this case violated the Fourth Amendment. There were several reasons for our emphasis on the exclusionary rule issue. Initially, petitioner did not wish to present what might appear to be solely a factual dispute to this Court. Moreover, this case arose in the context of a suppression motion made in a juvenile delinquency matter. The evidence sought to be suppressed had been obtained during an in-school search conducted by a vice-principal. Thus, if the petitioner's contention that the exclusionary rule was inapplicable to school searches was accepted by this Court, there would be no reason to reach the constitutionality of the underlying search. From petitioner's point of view this would be a desirable result since it would relieve those agencies in charge of presenting criminal prosecutions of the burden of justifying and explaining the actions of other independent agencies with

whom they have little contact and over whom they have no control. Such a result would permit appropriate criminal prosecutions while doing no violence to the Fourth Amendment.³

In placing strict emphasis on the exclusionary rule issue, New Jersey did not intend to manifest total accordance with the application of the standard enunciated by the New Jersey Supreme Court to the facts of this case. At oral argument of this case, petitioner noted that the standard set forth by the New Jersey Supreme Court was a workable standard and that the facts presented make this a close case. Certainly, the reasonable grounds standard enunciated by the state court is, in theory, a much more workable standard in the school context than the probable cause standard which is applicable to searches by police officers. Due to the need for school discipline, it is not possible to hold school teachers to the same standard that applies to police officers who are investigating crimes. The enunciation of a lower, commonsense-type standard is more likely to permit the proper functioning of the educational system than a more stringent standard.

³ It should be noted at the outset that in the New Jersey Supreme Court petitioner argued that many courts have adopted the position that the Fourth Amendment did not apply to school searches. (State's brief at 10). Petitioner also argued that if the Fourth Amendment were applied to school searches, the probable cause standard would not apply in this context since the student would not have the same expectation of privacy in a school setting as he would have in other places. (State's brief at 19 to 21). Moreover, petitioner argued that the search in the present case was totally proper. (State's brief at 21 to 23). The New Jersey Supreme Court ruled on these issues and did so on the basis of federal rather than state law. *State in the Interest of T.L.O.*, 94 N.J. 331, 340, 344-346, 347, 463 A.2d 934, 938, 940-942 (1983).

The New Jersey Supreme Court's application of this "reasonable grounds" standard to the facts of this case, however, seems inappropriate. While enunciating a standard which, on its face, allows school teachers to take reasonable steps to maintain school discipline without the necessity to comply with those standards applicable to police officers, the state court seems to have evaluated the vice-principal's actions as if he were a law enforcement officer governed by the strictures of probable cause. As noted by New Jersey Supreme Court Justice Schreiber in dissent:

Attendance at public school is compulsory. [N.J. Stat. Ann.] 18A:38-25. The State is thereby assembling large numbers of young people in schools and has a duty to protect students from being harmed by others and by themselves. The students have a right to pursue their academic endeavors without exposure to dangers or overwhelming distractions. In other words, school authorities have a duty to maintain "a proper educational environment." 3 W. LaFave; *Search and Seizure*, sec. 10.11, at 458 (1978).

* * *

In light of such policy considerations, the "reasonableness" of the searches in the cases before us must be measured against the nature and extent of the intrusions involved. *I part company with the majority's opinion in its assessment of the reasonableness of the school officials' conduct in these cases under either a "reasonable grounds to believe" or a "reasonable suspicion" standard. Regardless of the standard employed these minimal invasions of a student's privacy were a valid exercise of a school administrator's authority.*

After paying lip service to the principle that school officials have the authority to conduct reasonable searches necessary to maintain safe-

ty, order and discipline within the schools, *ante* at 343, the majority evaluates the conduct of the school official as if he were a policeman.

State in the Interest of T.L.O., 94 N.J. 331, 335-354, 463 A.2d 934, 945-946 (1983) (emphasis added).

Thus, although the standard enunciated by the New Jersey Supreme Court is facially reasonable and workable, that court's application of the standard presents unnecessary obstacles to proper school discipline. Both parties, at oral argument, agreed that the facts presented made this a close case. (AT21-16 to 22; AT35-6 to 9). In such a situation, teachers and administrators should not be faced with the dilemma of making the type of borderline decisions which the standard seems to require. As will be argued herein, commonsense and the need for school safety should be the linchpins. The vice-principal's actions in this case should be evaluated in this context.

A. The Fourth Amendment's Proscription Against Unreasonable Searches And Seizures Is Inapplicable To The Facts And Circumstances Of This Case.

In the present case, the New Jersey Supreme Court ruled that a search of a public high school student by a school official constitutes an official search for purposes of the Fourth Amendment. Accordingly, the state court subjected the search of respondent T.L.O. to Fourth Amendment scrutiny. Petitioner submits, however, that the facts and circumstances of this case indicate that the instant search did not fall within the purview of the Fourth Amendment because the vice-principal was not acting as a law enforcement officer.

This Court has never ruled that the Fourth Amendment regulates all searches of students or their belongings by school officials. In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969),

this Court determined that students were afforded First Amendment protection while in school. Subsequently, however, this Court in *Ingraham v. Wright*, 430 U.S. 651 (1972), held that in general the Eighth Amendment did not prohibit corporal punishment administered in school. The rulings in each case were predicated upon an analysis of the history of the particular amendment in question and the evils which it addressed. Read together, the cases indicate that the amendments comprising the Bill of Rights, including the Fourth Amendment, are not automatically applicable to actions of public school officials by virtue of the fact that such conduct is governmental action.⁴ Rather, the applicability of the Fourth Amendment to school searches conducted by school officials must be determined through an analysis of the text of the amendment in light of its history and a determination whether such searches lie within the evils which the amendment's drafters sought to proscribe.

An historical and textual analysis of the Fourth Amendment indicates that it was enacted to condemn and prevent the type of abuses perpetrated by colonial revenue officers who had been issued general warrants and writs of assistance by British officials. Such warrants and writs granted the officers unlimited discretion to search for smuggled goods. *See Boyd v. United States*, 116 U.S. 616, 624-632 (1886). To prevent a recurrence of the abuses which such unfettered discretion naturally engendered, the framers of the Fourth Amendment provided therein

⁴ Petitioner acknowledges that many authorities deem the Fourth Amendment to be applicable to school searches conducted by public school officials because such officials are employed by public entities. *See, e.g., Horton v. Goose Creek Ind. School Dist.*, 690 F.2d 470, 480 (5th Cir. 1982), *cert. denied* — U.S. —, 103 S.Ct. 3536 (1983); *State v. Baccino*, 282 A.2d 869 (Del. Super. Ct. 1971). *But see* contrary authorities listed in footnote 7, *infra*.

that a warrant must be supported by probable cause and must describe the place to be searched and the articles to be seized. This provision was linked by conjunction to a provision which required that official searches and seizures be conducted in a reasonable manner.⁵ Clearly, the historical context in which the Fourth Amendment was enacted and the juxtaposition in the amendment's text of the warrant requirement with the requirement of reasonable searches and seizures indicates that the amendment's framers enacted it to regulate investigations conducted by law enforcement officers.

In recent years, this Court has determined that the strictures of the Fourth Amendment apply to public officials who are not police officers but who, as an integral part of their duties, undertake searches for the purpose of discovering and preventing violations of law—*i.e.*, statutes, ordinances or administrative regulations or codes. This trend began with *Camara v. Municipal Court*, 387 U.S. 523 (1967), which applied the Fourth Amendment to searches conducted by housing inspectors. Subsequent to *Camara*, this Court applied the Fourth Amendment to fire inspectors, *See v. City of Seattle*, 387 U.S. 541 (1967); border patrol officials, *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); and Occupational Safety and Health Act (OSHA) inspectors, *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). Each of the cases in this trend involved area-wide exploratory searches by specialized law enforcement officers for violations of law and thus

⁵ The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

dealt with the kind of intrusion which the Fourth Amendment was intended to regulate. See *Boyd v. United States*, 116 U.S. at 624-632.

Thus, it must be concluded that the Fourth Amendment, properly viewed in its historical context, does not apply in every instance in which a government employee conducts a search.⁶ Rather, the amendment applies only to two kinds of situations: first, investigations of those suspected of crime by those performing the function of and employed as police officers or their agents; and second, searches carried out to prevent violations of administrative statutes or regulations having criminal or quasi-criminal penalties.⁷ Neither situation is involved here.

⁶ Such a position is not contrary to *Burdeau v. McDowell*, 256 U.S. 465 (1921), wherein it was stated that the Fourth Amendment is applicable to "governmental agencies." Clearly, the thrust of *Burdeau* was that the Fourth Amendment was not applicable to searches by private citizens, and not that the amendment was applicable to all governmental action. It should be noted that the *Burdeau* Court could not have conceived of the Fourth Amendment applying to school searches by public officials, since such officials acted under state authority and the Fourth Amendment had not yet been deemed to be applicable at the state level. *Mapp v. Ohio*, 367 U.S. 343 (1961). Moreover, the *Burdeau* Court reached its determination that private acts were beyond the purview of the Fourth Amendment through an historical analysis like the one stated above. Such an analysis clearly indicates that the amendment was enacted exclusively to proscribe unreasonable searches and seizures by law enforcement agents.

⁷ The Fourth Amendment's applicability is contingent upon the nature of the duties performed by a searching official rather than the fact of his public employment. A number of state court authorities have so determined. See, e.g., *J.M.A. v. State*, 542 P.2d 170 (Alaska 1975); *Bell v. State*, 519 P.2d 804 (Alaska 1974); *State v. Pearson*, 15 Or. App. 1, 514 P.2d 884, 886 (Ct. App. 1973). Other state courts have reached this conclusion within the context of a school search and

Clearly, the assistant vice-principal who conducted the search was not a law enforcement official. He had no greater responsibility for the detection of penal law violations than did the ordinary citizen. Moreover, the search was not motivated by an intent to ensure the enforcement of penal statutes or regulations. Rather, it was conducted exclusively for school related purposes—to protect the health of respondent and her peers and to facilitate school discipline. Since the assistant vice-principal was not a law enforcement official and was not functioning in a law enforcement capacity, the Fourth Amendment is inapplicable to the instant search. The New Jersey Supreme Court's determination to the contrary was thus erroneous.

have determined accordingly that the Fourth Amendment does not apply to a searching public school official. See, e.g., *D.R.C. v. State*, 646 P.2d 252 (Alaska Ct. App. 1982); *In re C.*, 26 Cal. App.3d 320, 102 Cal. Rptr. 682 (Ct. App. 1972); *In re G.*, 11 Cal. App.3d 1193, 90 Cal. Rptr. 361 (Ct. App. 1970); *In re Donaldson*, 269 Cal. App.2d 509, 75 Cal. Rptr. 220, 222 (Ct. App. 1969) ("We find the principal of the high school not to be a governmental official within the meaning of the Fourth Amendment so as to bring into play its prohibition of unreasonable searches and seizures."); *People v. Stewart*, 63 Misc.2d 601, 313 N.Y.S.2d 253 (Crim. Ct. 1970); *State v. Keadle*, 51 N.C. App. 660, 277 S.E.2d 456, 459-460 (Ct. App. 1981); *Commonwealth v. Dingfelt*, 227 Pa. Super. 330, 323 A.2d 145, 147 (Super. Ct. 1974) ("[s]chool officials are not law officers of the government. . ."); *Ranniger v. State*, 460 S.W.2d 181 (Tex. Civ. App. 1970); *Mercer v. State*, 450 S.W.2d 715, 717 (Tex. Civ. App. 1970) ("The principal in dealing with [the searched student] acted *in loco parentis*, not for an arm of government."). The United States Court of Appeals for the Tenth Circuit would apparently be receptive to such a position in an appropriate case. See *Palacios v. Foltz*, 441 F.2d 1196 (10th Cir. 1971) (actions of school officials in refusing to allow a student to run for election to student government were found not to constitute state action).

B. The Search Conducted In The Present Case Was Reasonable.

Assuming that the Fourth Amendment applies to school teachers and officials, the vice-principal's decision to search T.L.O.'s purse was reasonable and did not infringe upon T.L.O.'s Fourth Amendment rights. The vice-principal met T.L.O. after a teacher reported that T.L.O., contrary to school regulations, had been smoking in the restroom. When T.L.O. denied that she had been smoking in the lavatory and maintained that she did not smoke at all, the vice-principal opened her purse and observed a package of cigarettes. After removing the cigarettes in order to confront T.L.O. with the fact that she had lied, the vice-principal observed drug paraphernalia in plain view. This observation formed the basis for a further search into the purse, which revealed evidence suggesting that T.L.O. was distributing drugs. T.L.O. cannot establish that the vice-principal's actions violated her Fourth Amendment right to be free from unreasonable searches.

In *Camara v. Municipal Court*, 387 U.S. at 536-537, this Court observed that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." This concept of a flexible assessment of a search's reasonableness was more recently reiterated in *Bell v. Wolfish*, 441 U.S. 520 (1979), where the Court held:

The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.

Id. at 559.

The Fourth Amendment prohibits arbitrary invasions of a person's legitimate expectations of privacy by state officials. When society's substantial interest in providing students with an education in a safe environment is balanced against a student's limited privacy interests, it is manifest that a student has little—expectation of privacy in personal effects brought into the school. Hence, after the vice-principal received information from a teacher that T.L.O. had been smoking, his decision to examine her purse, which was capable of concealing evidence of the infraction, was reasonable.

In determining whether the official's decision to search was "reasonable", this Court must initially determine whether and to what extent T.L.O. had a protected privacy interest in the contents of her purse. After having determined the extent of the student's privacy interest, the Court should consider that privacy interest in determining under what circumstances it was "reasonable" to conduct a search. This Court may resolve these issues by considering categorically the nature of the authority conducting the search, as well as the purpose of the search; the school environment, including the age of the students; and society's interest in providing a safe and orderly environment conducive to the institutional objective of providing an education.⁸ See *Terry v. Ohio*, 392

⁸ The determination whether a particular search is "reasonable" for Fourth Amendment purposes is generally reached on a case-by-case basis after examination of the unique factual setting. See *Terry v. Ohio*, 392 U.S. 1, 17-18 n.15 (1968). This case-by-case analysis, however, has led to general rules which permit categorical treatment of searches conducted in certain delineated situations. See *Hudson v. Palmer*, ___ U.S. ___, 52 U.S.L.W. 5052, 5057 (U.S. July 3, 1984) (O'Connor, J., concurring). See, e.g., *id.* at 5053-5057 (prisoners have no constitutionally protected expectation of privacy in their prison

U.S. 1, 9 (1968) (although the Fourth Amendment guarantees the right to personal security in all places the "specific contents and incidents of this right must be shaped by the context in which it is asserted"); cf. *Goss v. Lopez*, 419 U.S. 565 (1975) (although the due process clauses of the Fifth and Fourteenth Amendments apply to students, a court must weigh heavily the institutional concerns of schools when determining what process is due).

1. T.L.O. had no legitimate expectation of privacy in the contents of her purse.

A citizen has no absolute right to privacy. The Fourth Amendment provides only that governmental searches must not be arbitrary. The applicability of the Fourth Amendment turns on whether "the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." See, e.g., *Hudson v. Palmer*, ___ U.S. ___, 52 U.S.L.W. 5052, 5054 (U.S. July 3, 1984), quoting *Smith v. Maryland*, 442 U.S. 735, 740 (1979). This Court must thus determine whether a student's claim of privacy is the kind of expectation that society is prepared to recognize as "reasonable." *Hudson v. Palmer*, ___ U.S. at ___, 52 U.S.L.W. at 5054, citing

cell); *United States v. Ross*, 456 U.S. 798 (1982) (search of vehicles and all containers found therein); *United States v. Santana*, 427 U.S. 38, 43 (1976) (law enforcement officers may conduct a warrantless search to prevent the loss or destruction of evidence); *United States v. Robinson*, 414 U.S. 218, 235 (1973) (searches without a warrant are permissible when incident to a lawful custodial arrest); *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) (border searches); *Terry v. Ohio*, 392 U.S. 1 (1968) (reasonable suspicion justifies stop and frisk for weapons). The issues raised by a school official's search of a student suspected of violating school regulations are appropriate for such categorical treatment.

Katz v. United States, 389 U.S. 347, 360-361 (1967) (Harlan, J., concurring).

As this Court recently held, "Determining whether an expectation of privacy protectible under the Fourth Amendment is 'legitimate' or 'reasonable' necessarily entails a balancing of interests." *Hudson v. Palmer*, ___ U.S. at ___, 52 U.S.L.W. at 5054. The two interests at issue here are society's substantial interest in an educated populace and in the security of its educational facilities as balanced against the limited privacy interests of a student. The balancing of these interests demonstrates that a student has at most a minimal expectation of privacy in personal effects brought into the school.

No one argues that the State's interest in providing its citizens with an education is insubstantial. As this Court has repeatedly emphasized, "Education is perhaps the most important function of state and local governments." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Similarly, this Court has recognized that the student has a substantial interest in receiving a public education. See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 29-30 (1973). In accordance with these strong interests, this Court has recognized that, to fulfill its educational purpose, the State's authority to prescribe and enforce standards of conduct in its schools must be very broad. See, e.g., *Goss v. Lopez*, 419 U.S. at 574; *Ingraham v. Wright*, 430 U.S. at 681; *Tinker v. Des Moines Independent Community School District*, 393 U.S. at 507. The State's authority to regulate a student's conduct originates with its need to maintain an environment conducive to education and also to fulfill its obligation to the students and to their parents to provide a safe learning environment.

The school official's need to maintain order and discipline and to protect the health and welfare of the students requires that the school official be afforded the authority to search students.⁹ Society's general interest in the prevention of crime is even more compelling when the suspect is a juvenile because of a state's *parens patriae* interest in the welfare of the child. *Schall v. Martin*, ___ U.S. ___, 81 L.Ed 2d 207, 216, 52 U.S.L.W. 4681, 4684-4685 (U.S. June 4, 1984). See also *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) (minority "is a time and condition of life when a person may be most susceptible to influence and psychological damage"); *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (juveniles "often lack the experience, perspective and judgment to recognize and avoid choices that could be detrimental to them"). The state's interest in protecting juveniles is heightened in the school environment because the state has compelled their attendance.

A student's safety while attending school, although an important consideration in itself, is also fundamental to the educational process. The significance of these institutional concerns—safety of the school community and the need for an orderly working environment—"must be viewed in light of the disciplinary problems commonplace

⁹ Some commentators refer to the special relationship between the school official and the student, which arises from the school officials' role in supervising and safeguarding students. It has long been recognized that a school official undertakes the safety and supervision of the students submitted to his charge and likewise, because of this added responsibility, undertakes "such a portion of the power of the parent . . . that of restraint and correction, as may be necessary to answer the purposes for which he is employed." 1 W. Blackstone, Comm. 453 (1870). Because of this special relationship between the school official and the student, the official is deemed to stand *in loco parentis*. *Frels, Searches and Seizures in the Public School*, 11 *Hous. L. Rev.* 876 (1974).

in the schools." *Ingraham v. Wright*, 430 U.S. at 681. As the Court noted in *Goss v. Lopez*, 419 U.S. at 580, "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action."¹⁰

The teacher who, in the midst of an examination, suspects that a student possesses a "crib sheet"; a school principal who hears a rumor that a weapon has been brought into the school by a student who intends to settle a dispute with another student; or a school counselor who learns that a drug distributor is working within the school environment must act immediately to eliminate the threat to the proper operation of the school. Indeed, this Court has recognized that to delay the imposition of discipline is often tantamount to a failure to discipline. See *Ingraham v. Wright*, 430 U.S. at 680-681.

For this reason, assessment of the need for, and the appropriate means of maintaining school discipline "is committed generally to the discretion of school authorities subject to state law." *Ingraham v. Wright*, 430 U.S. at 682. The safety of the school community, and the substantial interest in public education that both the State and the individual student share, must be balanced against the student's limited expectations of privacy.

Balanced against the institutional requisites is the invasion of personal rights which any search may entail. However, it is also clear that students within the public schools do not occupy the same constitutional position as either adults or children outside that location. Juveniles

¹⁰ It is instructive to note that in all but one of the past 15 years, the public has ranked discipline as the number one problem in schools. Since 1978, drugs have generally placed second in priority only to discipline. Elam, *The Gallup Education Surveys: Impressions of a Poll Watcher*, *Phi Beta Kappan Magazine*, Sept. 1983, at 26-27.

are subject to a greater degree of parental and state control than adults.¹¹ *Cf. Schall v. Martin*, ____ U.S. at ____, 81 L.Ed 2d at 218, 52 U.S.L.W. at 4684. Because children lack the capacity to care for themselves they are subject to the control of their parents and the state when acting in place of the parent. *Id.* Consequently, in many situations a juvenile's expectation of privacy will not be as great as that of an adult. A school environment presents one of these situations.

From the time a student attends school, the school takes on the parents' responsibilities to manage and protect that student. And, in the public school, it may be necessary to subordinate an individual student's liberty and privacy interests to the school's obligation and interest in preserving and promoting the student's general welfare. *Id.* at ____, 81 L.Ed. 2d at 216, 52 U.S.L.W. at 4684-4685. Although the Fourth Amendment protects "people not places," *United States v. Katz*, 389 U.S. at 351, this Court has emphasized that the location of the search is a significant factor that must be considered in assessing an individual's claim of privacy. *United States v. Ross*, 456 U.S. at 823 ("[T]he protection afforded by the [Fourth] Amendment varies in different settings").

Students have a lessened expectation of privacy in a school environment because of the expected restraint

¹¹ Some students are adults. Nevertheless, when they willingly enter the school environment, they necessarily accept the school regulations and the resulting limitations on their privacy. *N.J. Stat. Ann.* 18A:38-25 (West 1968) (school attendance is compulsory only to age 16). In an environment where juveniles are closely scrutinized and regulated for their own protection, other persons entering that environment may expect to be subjected to similar scrutiny. *Cf. United States v. Biswell*, 406 U.S. 311, 316 (1972) (firearms dealer enters business with knowledge of pervasive regulation and therefore cannot object to warrantless search).

necessary for security or discipline and the constant interaction among students, faculty and administrators. *See, e.g., In re L.L.*, 90 Wis.2d 585, 600-601, 280 N.W.2d 343, 350-351 (1979). In this regard, *N.J. Stat. Ann.* 18A:37-1 (West 1968) provides:

Pupils in the public schools shall comply with the rules established in pursuance of law for the government of such schools, pursue the prescribed course of study and submit to the authority of the teachers and others in authority over them.

Thus, while attending public school, the student has a legal duty to submit to the authority of school officials. In accordance with their duty to maintain discipline, school officials closely scrutinize students. It is therefore unrealistic for a student to claim more than a minimal expectation of privacy. *Cf. Donovan v. Dewey*, 452 U.S. 594, 598-599 (1981) (warrantless search of stone quarry permitted because owner has limited expectation of privacy due to pervasive regulation of mining operations); *United States v. Biswell*, 406 U.S. 311, 316 (1972) (warrantless search of firearms dealer permissible because dealer entered business with knowledge of the pervasive regulation). This examination of the school environment demonstrates that a student necessarily has a diminished expectation of privacy upon entering a school.

A second component of the privacy inquiry is the scope of the intrusion or the object of the search, for the level of privacy that an individual may expect is determined in part by the nature of the search undertaken. *See, e.g., Oliver v. United States*, ____ U.S. ____, 104 S.Ct. 1735, 1740-41 (1984); *Rakas v. Illinois*, 439 U.S. 128 (1978); *United States v. Chadwick*, 433 U.S. 1, 7-9 (1977). A student can claim no legitimate expectation of privacy in school property, such as lockers or desks, temporarily

used by the student for storage of books or clothing. Such items are randomly assigned and the length of possession may vary from a class period to an entire semester. The school's ownership of the items is unquestioned and it reserves the right to inspect or reclaim the property at any time. Generally, school regulations provide notice regarding the proper use of these facilities and the school's intention to ensure that these amenities are properly maintained. As the school officials have the authority to enter and to inspect these areas to ensure compliance with health and safety requirements as well as school regulations, a student has no legitimate expectation of privacy to rely on in an effort to prevent the search. Since a school, of necessity, retains a right to search areas such as lockers and desks for safety and health violations in general, a student cannot maintain that if the safety or health violations also relate to violations of our criminal laws—as in the case of weapons or illicit drugs—that the criminal nature of the locker's contents vests him with a greater expectation of privacy than he would otherwise have. Compare *Stoner v. California*, 376 U.S. 483, 485-486 (1964), with *United States v. Jeffers*, 342 U.S. 48 (1951). The school maintains full access to and control over these areas. Thus, they are fully entitled to search places of this type at any time and may validly consent to searches by others. See *United States v. Matlock*, 415 U.S. 164, 170-171 (1974).

Moreover, items such as lockers and desks are not provided for the purpose of affording a student privacy but to further the school's interest in safety by providing storage facilities. It would be anomalous, therefore, for a student to argue that the school's interest in safety, which prompted the school to provide these facilities, should be subordinate to the student's interest in shielding the contents of a locker or desk so that the school is restrained

from maintaining the safety of these facilities. The student simply has no legitimate reason to expect privacy in these items.

A student may, however, claim a limited expectation of privacy in his person and in personal effects that are closely associated with the person and that are legitimately brought to school. Cf. *United States v. Chadwick*, 433 U.S. at 9; *Terry v. Ohio*, 392 U.S. at 1. It is this limited privacy interest which must be balanced against society's substantial interest in education and safety. It is also apparent, however, that a student has little or no expectation of privacy in personal possessions that are not required in school. By exercising a choice in transporting personal items into a school, a student may be deemed to have waived a privacy claim. Any arguable privacy interest in such unnecessary items of personal property must be subordinate to the school's safety and disciplinary needs. Society's substantial interest in providing an education in a safe environment, and indeed the student's interest in receiving an education, outweighs the student's limited privacy interests in personal possessions brought into the school. Under this rationale, a student has no protected expectation of privacy in such items within the school. Hence, T.L.O.'s purse, voluntarily and unnecessarily brought into the school, may be deemed to be an item in which any privacy interest was so minimal that, as to it, the Fourth Amendment is inapplicable. And, in the absence of a finding that a privacy interest has been violated, there is no need for the Court to reach the issue of whether the search was reasonable. If this Court concludes, however, that a student retains some privacy interest in personal posses-

sions unnecessarily brought into the school, that interest is necessarily minimal.¹²

2. Society's substantial interest in school safety and discipline justifies searches based on reasonable suspicion.

In balancing the school's need to search in order to promote discipline against T.L.O.'s expectation of privacy in her purse, it is clear that the search conducted in this case was constitutionally reasonable.¹³ The nature of the school environment and its institutional concerns man-

¹² The student's expectation of privacy is higher with regard to items necessarily brought into the school, such as clothing. The privacy expectation is clearly greatest when the school official seeks the extreme intrusion of a strip search. Where the privacy interest is higher, the countervailing institutional need to search must be greater in order to justify the search.

¹³ It cannot seriously be maintained that school officials should be required to obtain a warrant before conducting searches for infractions of school rules. This Court has observed that a warrant must be secured when "reasonably practicable." *United States v. Ross*, 456 U.S. 798, 807 (1982), citing *Carroll v. United States*, 267 U.S. 132, 156 (1925). No warrant will be required when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967). The warrant requirement is incompatible with society's interest in safe educational institutions.

School officials face countless infractions of school rules. *Ingraham v. Wright*, 430 U.S. 651, 681 (1972). To maintain order in the schools, infractions must be dealt with immediately. The delay in resolving controversies engendered by the warrant process would disrupt the educational process. Imposition of a warrant requirement for school disciplinary searches would significantly hamper the school's ability to enforce discipline. As this Court observed in another school context,

Hearings - even informal hearings - require time, personnel, and a diversion of attention from normal school pur-

date that a school official be permitted to search when the school official has an articulable or reasonable basis either for searching a particular student or an entire area of the school.¹⁴ *Cf. Delaware v. Prouse*, 440 U.S. 648, 663 (1979). This standard would adequately protect the student's minimal privacy interest from arbitrary invasions while affording the school official the necessary flexibility to maintain school safety and discipline.

suits. School authorities may well choose to abandon . . . punishment rather than incur the burdens of complying with the procedural requirements.

Ingraham v. Wright, 439 U.S. at 680.

See also *United States v. Ross*, 456 U.S. at 816 n.21 (requirement that a law enforcement officer must obtain a separate warrant to search each container located within a vehicle entails expenditure of time and public resources not justified by individual's privacy interest). Moreover, the lengthy delays involved in obtaining a warrant would increase the intrusion and serve to further stigmatize the subject of the search. *Cf. United States v. Ross*, 456 U.S. at 822 n.28 (prohibiting police from opening containers found in a vehicle until they obtained a warrant would increase the intrusion on privacy interests). In sum, the nature of the school environment and purpose of the institution mandate the conclusion that the warrant requirement does not apply to searches conducted by school administrators.

¹⁴ There is no need for a particularized suspicion focused upon an individual student in order for a school search to be undertaken. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-561 (1976). If, for example, a school were experiencing a pervasive drug or weapon problem in its general student population, there would be no impediment to a search of all personal effects brought into the school. See *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). Where such an unfocused need to search is shown, there is no further need for individualized suspicion because such a search does not involve the unconstrained exercise of discretion. Indeed, the standard of reasonableness imposed on the exercise of official discretion by the Fourth Amendment is to prohibit only arbitrary invasions of an individual's privacy. *Delaware v. Prouse*, 440 U.S. at 654; *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978); *United States v. Martinez-Fuerte*, 428 U.S. at 555.

Indeed, the New Jersey Supreme Court adopted this standard in this case. The court stated that a school official need only have "reasonable grounds" to believe that evidence of a crime or school violation would be found in order to search. The court nevertheless invalidated the vice-principal's search of T.L.O.'s purse. An examination of the facts reveals that the New Jersey Supreme Court erred in concluding that the vice-principal lacked "reasonable grounds." The vice-principal's search of T.L.O.'s purse was a minimal invasion of her privacy.¹⁵ This minimal affront to the student's institutionally limited privacy interest was a valid exercise of the vice-principal's authority to assure that the school regulation against smoking was not violated and to discipline T.L.O. if a violation had occurred. A teacher reported that T.L.O. had been smoking in the girls' restroom, in violation of a school regulation. When questioned by the school vice-principal, T.L.O. not only denied the offense, but asserted that she did not smoke at all. The vice-principal thereupon opened her purse and observed a package of cigarettes in plain view, thus revealing that T.L.O. had lied when she claimed that she did not smoke and further that T.L.O. was also probably untruthful when she denied violating the school regulation.

As T.L.O. voluntarily carried the purse and its contents into the highly regulated location of a public school, T.L.O. could have only a very limited expectation of

¹⁵ It is noted that the student's consent to the search of her purse in the present case may very well have constituted a valid consent search for Fourth Amendment purposes. *United States v. Menendez*, 446 U.S. 544 (1980); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Nevertheless, the New Jersey courts adhere to a higher standard for consent searches than that enunciated in the foregoing cases. *State v. Johnson*, 68 N.J. 349, 346 A.2d 66 (1975). Therefore, no argument in this regard was made at the state court level.

privacy in the contents of her purse. Hence, the intrusiveness of opening the purse to see the immediately visible contents was minimal. When contrasted with the broad supervisory authority of the school official to enforce school regulations, it is manifest that the action of the vice-principal was entirely reasonable, perhaps even essential to his duties. Once the cigarettes were removed, the drug paraphernalia was in plain view, thereby justifying a more complete search of the purse. That the New Jersey Supreme Court first described a standard of "reasonable grounds" and then proceeded to label this search improper under that standard, reveals either that the standard is too readily, and incorrectly, equated with that of probable cause or that the state court simply misapplied it.

Thus, we submit that a search within the school context is reasonable when the school official conducting the search can provide an articulable basis for the need to conduct a particular search. Where a school official has such a basis for believing that a student possesses evidence of illegal activity or of an activity which would interfere with school discipline and order, the school official has the right to conduct a search for such evidence. This standard will allow school officials to properly exercise their authority to discipline students and maintain an orderly learning environment.

To effectively manage students in the public school, a school official must be free to exercise his judgment "independently, forcefully, and in a manner best serving the long-term interest of the school and students." *Wood v. Strickland*, 420 U.S. 308, 320 (1975). The operation of each component of our educational system must depend on the experience and common sense of our school personnel. Where a school official believes it necessary or advisable in the exercise of his disciplinary duties to undertake

a search of a student, his judgment should be accorded great weight. For, indeed, our teachers are on the front-line in protecting our children from themselves and other students. Theirs is a formidable struggle to educate and develop the best in our youth, and teachers must be as unconstrained as possible in achieving this end.

CONCLUSION

For the foregoing reasons, the State of New Jersey urges this Court to rule that, under the facts and circumstances of this case, the assistant principal's search of respondent's purse did not violate the Fourth Amendment. Moreover, in reliance on the arguments made in the briefs previously filed by petitioner, we urge this Court to rule that the exclusionary rule is inapplicable to school searches performed by school administrators and teachers and, therefore, to reverse the decision of the New Jersey Supreme Court suppressing evidence.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF NEW JERSEY, PETITIONER

v.

T.L.O.

*ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING REVERSAL**

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3788

QUESTION PRESENTED

The United States will address the question put to the parties in the Court's order of July 5, 1984:

Whether the assistant vice principal violated the Fourth Amendment in opening respondent's purse in the facts and circumstances of this case.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-712

STATE OF NEW JERSEY, PETITIONER

v.

T.L.O.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEYBRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES

This case raises important questions concerning the measures public school officials may take to maintain the order and discipline essential to their educative mission. While education is primarily the responsibility of state and local governments, the federal government provides substantial amounts of money to support programs in public schools. See, e.g., Education Amendments of 1978, 20 U.S.C. 2701 *et seq.*; Dep't of Education Organization Act, 20 U.S.C. 3401 *et seq.* Those expenditures will be more fruitful to the extent that the recipient schools are able to maintain an effective educational environment. Accordingly, as part of its overall program to improve the quality of education, the federal government has devoted considerable attention to the problem of school discipline. Among other things, the Departments of Education and Justice have established the National School Safety Center, the primary mission of which is the collection and dissemination of data on school safety and crime prevention techniques and legal

information regarding school discipline. The Department of Education also is working to combat school crime by evaluating activities currently underway in local school districts and identifying measures that can be employed by local jurisdictions to reduce school crime and disorder.

The growing lack of discipline and disorder in the public schools is a national problem, the solution to which entails a commitment from the United States to help parents and state and local education officials. The disposition of this case undoubtedly will have a substantial impact on the federal government's initiatives in this area.

STATEMENT

1. On the morning of March 7, 1980, a mathematics teacher at Piscataway High School entered the girls' restroom and found respondent and another girl, Miss Johnson, holding what the teacher thought to be lighted cigarettes (Pet. App. 2a; 9/26/80 Tr. 20). School regulations prohibited smoking in the restrooms, and the teacher accordingly took the two girls to the principal's office (Pet. App. 2a). There, the girls met with Theodore Choplick, the assistant vice principal (9/26/80 Tr. 22, 27).

Mr. Choplick asked the girls whether they had in fact been smoking. Miss Johnson admitted that she had been smoking, and Mr. Choplick disciplined her by assigning her to a three-day smoking clinic. Pet. App. 2a. Respondent not only denied smoking in the restroom, but in addition claimed that she did not smoke at all (*ibid.*). To resolve the credibility dispute, Mr. Choplick asked respondent to accompany him to a private office (*ibid.*).

Inside the office, Mr. Choplick asked to see respondent's purse, and she gave it to him. When Mr. Choplick opened the purse, a package of Marlboro cigarettes was immediately visible. Mr. Choplick held up the Marlboros and said to respondent, "[y]ou lied to me." Pet. App. 2a.

As he reached into respondent's purse for the cigarettes, Mr. Choplick saw in plain view a package of roll-

ing papers (Pet. App. 2a); respondent denied that the rolling papers belonged to her (9/26/80 Tr. 28-29). Based on his experience, Mr. Choplick believed that the presence of rolling papers indicated some connection to marijuana smoking. Accordingly, Mr. Choplick looked further into respondent's purse and found marijuana, additional drug paraphernalia, written documentation of respondent's sale of marijuana to other students, and a significant amount of cash (\$40) for a 14-year-old to be carrying. Mr. Choplick then called respondent's mother and notified the police. Pet. App. 2a.

Respondent's mother agreed to a police request to bring her daughter to police headquarters for questioning. At the station house, respondent was advised of her *Miranda* rights in her mother's presence and signed a waiver of those rights. An officer then questioned respondent in her mother's presence. Respondent admitted that the objects found in her purse belonged to her, and she further admitted that she had been selling marijuana at school, receiving \$1.00 per "joint." She stated that she had sold between 18 and 20 joints at school that morning before the smoking incident. Pet. App. 2a, 28a.

Respondent was suspended from school for three days for smoking cigarettes and for seven days for possession of marijuana. She challenged the suspension in court, alleging that the search of her purse had violated the Fourth Amendment. The court upheld the three-day suspension for smoking cigarettes but vacated the seven-day suspension for possession of marijuana on the ground that the search that revealed the marijuana had been conducted in violation of the Fourth Amendment. Pet. App. 2a-3a nn.1 & 2; 27a.¹

The state charged respondent with delinquency, based on possession of marijuana with the intent to distribute it, in violation of N.J. Stat. Ann. §§ 24:21-19(a)(1) and 24:21-20(a)(4) (West. Supp. 1984). Respondent moved to suppress the evidence seized from her purse,

¹ Respondent's challenge to her suspension from school is not at issue in this case.

as well as her confession, contending that the allegedly illegal search tainted the confession. Pet. App. 2a.

2. On September 26, 1980, the state trial court denied respondent's motion to suppress the evidence taken from her purse. Pet. App. 27a-37a. Respondent was then tried, found guilty, and adjudicated a delinquent. She was sentenced to probation for one year with the special conditions that she observe a reasonable curfew, attend school regularly, and successfully complete a counseling and drug therapy program.

Respondent appealed to the Superior Court of New Jersey, Appellate Division. That court affirmed the denial of her motion to suppress, but it remanded the case to the trial court to determine whether respondent had made a valid waiver of her *Miranda* rights. Pet. App. 22a.

Respondent appealed the denial of her motion to suppress to the Supreme Court of New Jersey. That court held that school officials may conduct warrantless administrative searches on school premises if they have reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order. In this case, however, the court held that Mr. Choplick lacked reasonable grounds to search respondent's purse. Concluding that the exclusionary rule applies to searches and seizures of students in public schools, the state supreme court suppressed the evidence seized from respondent's purse. Pet. App. 1a-14a. Two justices dissented, believing that Mr. Choplick had reasonable grounds for the search in this case. *Id.* at 14a-21a.

SUMMARY OF ARGUMENT

I. Although we submit that it misapplied the law to the facts of this case, we agree with the Supreme Court of New Jersey (Pet. App. 9a-11a) that the Fourth Amendment does not require school officials to have probable cause and a warrant to search for evidence of a school infraction. The "overarching principle * * *

embodied in the Fourth Amendment" is one of "'reasonableness.'" *United States v. Villamonte-Marquez*, No. 81-1350 (June 17, 1983), slip op. 9. Moreover, "reasonableness" depends on the context in which a particular search or seizure occurs. See *Wyman v. James*, 400 U.S. 309, 318 (1971); *Terry v. Ohio*, 392 U.S. 1, 9 (1968). Probable cause and a warrant, though frequently required, are not absolutes. The Court has held that the warrant requirement is inapplicable in certain circumstances, and "reasonable suspicion," in lieu of probable cause, is all that is required in many instances.

Focusing on context, the Court has developed special rules for border searches, civil or administrative searches, and searches conducted in furtherance of "community caretaking" functions. These cases establish that a search or seizure may be "reasonable" within the meaning of the Fourth Amendment even if probable cause is lacking. In addition, the cases establish that the probable cause standard "is peculiarly related to criminal investigations" (*South Dakota v. Opperman*, 428 U.S. 364, 370 n.5 (1976)). Moreover, the mere fact that a search held reasonable on less than probable cause produces evidence that is subsequently used in criminal proceedings does not alter the requisite level of suspicion (*id.* at 370-375). Finally, the pertinent cases demonstrate that the reasonableness of particular classes of searches or seizures generally is determined on a categorical basis rather than a case-by-case approach. Here, a number of unique factors call for the placement of school searches in a special category, with the result that school officials seeking to enforce school rules and regulations need not demonstrate probable cause in order to satisfy the Fourth Amendment's standard of reasonableness.

II. A. While "students [do not] shed their constitutional rights * * * at the schoolhouse gate" (*Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969)), the Court nevertheless has often recognized the unique nature of children and the school

setting and has declined to "constitutionalize" the entire educational process. For example, in *Ingraham v. Wright*, 430 U.S. 651 (1977), the Court, in rejecting the applicability of the Eighth Amendment to corporal punishment administered as a method of disciplining public school students, endorsed the common law notion that "the State . . . may impose such corporal punishment as is reasonably necessary 'for the proper education of the child and for the maintenance of group discipline.'" *Id.* at 662 (quoting 1 F. Harper & F. James, *Law of Torts* § 3.20, at 292 (1956)). So too, in *Goss v. Lopez*, 419 U.S. 565 (1975), the Court's holding that due process requires notice and a hearing before a child may be suspended from school was tempered by the recognition that the "hearing" could be quite "rudimentary," amounting to no more than "the disciplinarian . . . informally discuss[ing] the alleged misconduct with the student minutes after it has occurred" (*id.* at 581-582). The Court concluded that more formal requirements would be counterproductive and could destroy the effectiveness of suspensions "as part of the teaching process" (*id.* at 583). As in *Ingraham* and *Goss*, both history and common sense argue persuasively against imposing rigid requirements derived from criminal proceedings on public school administrators charged with maintaining order in the schools and an atmosphere conducive to learning.

B. 1. The Court has on several occasions relied on "longstanding, historically recognized" practices to uphold particular types of searches on less than probable cause. *United States v. Ramsey*, 431 U.S. 606, 621 (1977). See also, *e.g.*, *Villamonte-Marquez*, slip op. 6-8; *United States v. Biswell*, 406 U.S. 311, 314 (1972). The authority of school officials to supervise their students free of the full panoply of legal constraints imposed upon the actions of other state officials was established in colonial times, and it has been exercised virtually unquestioned for over 200 years. This historical practice has its origins in the common law doctrine that

teachers act *in loco parentis*, exercising authority delegated from the parent. See 1 W. Blackstone, *Commentaries* *453. Relying in part on this longstanding tradition, state and lower federal courts have overwhelmingly approved the actions of school officials in cases such as this one.

2. Although the pure, Blackstonian version of the *in loco parentis* doctrine may not be fully applicable to a system of compulsory education, the doctrine serves well as the backdrop for analysis in this case. Even in the absence of formal delegation from parents, teachers have been given responsibilities *like* those of parents, and they must be afforded concomitant leeway to exercise those responsibilities in a manner that best effectuates their educative mission.

While teachers are far more than "caretakers," their responsibility for student welfare makes searches on the basis of less than probable cause reasonable; school officials are responsible not only for teaching students but for preserving order and discipline in the interests of the entire student body. Sadly, disorder and crime in the public schools have reached epidemic proportions. See pages 22-23, *infra*. Many schools today are in such a state of disorder that the very safety of students and teachers is imperiled. School searches—conducted in a prompt and informal way—are a vital means of protecting students and teachers from weapons and drugs and enforcing school disciplinary rules.

In addition to maintaining order for safety's sake, teachers must be able to teach. Many educators attribute the decline in educational achievement in this country to the lack of effective discipline. See pages 23-24, *infra*. In the secondary school setting, however, "discipline" meted out according to the formal procedures of the criminal justice system would likely be destructive of the special relationship between students and teachers so necessary for successful teaching. Teachers and school administrators need the freedom to deal with incidents of student misbehavior in prompt and informal ways

that teach the moral value and necessity of adherence to society's rules without elevating every misdeed to the level of an adversarial confrontation.

The political process provides significant protection against abuses by school officials of their authority. A large and highly motivated segment of the public—parents with school-age children—is immediately aware of abuses and, acting through locally-elected school boards, can hold teachers and administrators accountable. See *Ingraham v. Wright*, 430 U.S. at 670. The availability of this effective political supervision counsels strongly against judicial imposition of rigid requirements on school officials attempting to perform the mission with which society has entrusted them.

III. The assistant vice principal in this case was, beyond question, aware of "specific articulable facts, together with rational inferences from those facts, that reasonably warrant[ed] suspicion" that respondent had violated a school rule. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975). Mr. Choplick had received an eyewitness report from an unquestionably credible source that respondent had violated a school regulation by smoking in the restroom. Respondent's denial, and her claim that she was a nonsmoker, were hardly sufficient, without more, to overcome the reasonable suspicion generated by the teacher's report. Opening respondent's purse to determine whether its contents might reveal the truth of the matter was surely reasonable under the circumstances. In holding that the mere possession of cigarettes was irrelevant to the alleged infraction (Pet. App. 12a), the Supreme Court of New Jersey appears to have revived the "mere evidence" rule rejected by this Court in *Warden v. Hayden*, 387 U.S. 294, 300-310 (1967). Under *Hayden*, the controlling question is whether the possession of cigarettes would aid in establishing a violation of the prohibition against smoking in the restrooms. *Id.* at 307. The answer to that question is clearly affirmative.

The New Jersey court also erred in its suggestion (Pet. App. 12a) that even if it was reasonable for Mr.

Choplick to open respondent's purse, he should not have searched her entire purse. But once the Marlboros had been removed, and the rolling papers were in plain view, Mr. Choplick had probable cause (not merely reasonable suspicion) to believe that respondent possessed marijuana, and he was then justified in searching her entire purse for evidence of drug dealing. Compartmentalization of the search of the purse was no more required or feasible than is compartmentalization of the search of an automobile. See *United States v. Ross*, 456 U.S. 798, 820-821 (1982). Accordingly, the judgment below, suppressing the evidence discovered in respondent's purse, should be reversed.

ARGUMENT

THE ASSISTANT VICE PRINCIPAL'S SEARCH OF RESPONDENT'S PURSE DID NOT VIOLATE THE FOURTH AMENDMENT

I. The Level Of Suspicion Required For Particular Categories Of Searches Depends Upon The Context In Which The Search Is Undertaken

A. The Supreme Court of New Jersey held (Pet. App. 9a-11a) that the Fourth Amendment does not require school officials to have probable cause and a warrant to search for evidence of a school infraction, and we agree. "[T]he overarching principle . . . embodied in the Fourth Amendment" is one of "reasonableness." *United States v. Villamonte-Marquez*, No. 81-1350 (June 17, 1983), slip op. 9. The Fourth Amendment "does not denounce all searches or seizures, but only such as are unreasonable." *Carroll v. United States*, 267 U.S. 132, 147 (1925).² Because "[t]he test of reasonableness un-

² See also *United States v. Place*, No. 81-1617 (June 20, 1983), slip op. 6, 10; *Michigan v. Summers*, 452 U.S. 692, 699-700 (1981); *Donovan v. Dewey*, 452 U.S. 594, 599 (1981); *Bell v. Wolfish*, 441 U.S. 520, 558 (1979); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106, 108-109 (1977); *Cady v. Dombrowski*, 413 U.S. 433, 439, 448 (1973); *Wyman v. James*, 400 U.S. 309, 318 (1971); *Camara v. Municipal Court*, 387 U.S. 523, 539 (1967); *Cooper v. California*, 386 U.S. 58, 62 (1967).

der the Fourth Amendment is not capable of precise definition or mechanical application," *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), "the specific content and incidents of th[e] right [to be free from unreasonable searches and seizures] must be shaped by the context in which it is asserted." *Wyman v. James*, 400 U.S. 309, 318 (1971) (quoting *Terry v. Ohio*, 392 U.S. 1, 9 (1968)).³

A necessary corollary of the focus on context has been the development of different standards of reasonableness under the Fourth Amendment for different types of searches and seizures. In the typical case of law enforcement officers investigating criminal acts, for example, the Court generally has required both probable cause and a warrant. See, e.g., *United States v. United States District Court*, 407 U.S. 297, 317 (1972). In other contexts, however, the Court has lowered the threshold of suspicion required for a lawful search or seizure from probable cause to "reasonable suspicion." The most well-known example, of course, is the "stop and frisk" procedure approved in *Terry v. Ohio*, *supra*. See also *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). But *Terry* has not been limited to its facts; the Court has permitted searches and seizures on the basis of reasonable suspicion in other circumstances as well. See, e.g., *Michigan v. Long*, No. 82-256 (July 6, 1983) (search of passenger compartment of car during investigatory stop); *Michi-*

³ See also *Villamonte-Marquez*, *slip op.* 9, 13-14; *Bell v. Wolfish*, 441 U.S. at 559; *United States v. Ramsey*, 431 U.S. 606, 616 (1977); *United States v. Martinez-Fuerte*, 428 U.S. 543, 551, 555-556, 561 (1976); *South Dakota v. Opperman*, 428 U.S. 364, 375 (1976); *Terry v. Ohio*, 392 U.S. at 9, 27; *Camara v. Municipal Court*, 387 U.S. 523, 534-540 (1967); *Cooper v. California*, 386 U.S. 58, 59 (1967); 3 W. LaFare, *Search and Seizure* § 9.1 (1978 & Supp. 1984); Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 395 (1974); Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 Iowa L. Rev. 739, 753-754 (1974); LaFare, *Administrative Searches and the Fourth Amendment: The Camera and See Cases*, 1967 Sup. Ct. Rev. 1, 20.

gan v. Summers, 452 U.S. 692 (1981) (seizure of individual outside premises while executing warrant).

Border searches are a special area in which the Court, under the touchstone of the reasonableness standard, has looked to context to determine the requirements of a lawful search or seizure and concluded that the traditional standard of probable cause and a warrant is generally inappropriate. In *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Court, while prohibiting stops based solely on the appearance of Mexican ancestry, upheld the authority of the Border Patrol to stop a vehicle and question its occupants if the agents possess reasonable suspicion that the vehicle may contain illegal aliens. But cf. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (full search of automobile requires probable cause and a warrant). In *United States v. Ramsey*, 431 U.S. 606 (1977), the reasonable suspicion standard for border searches was held to encompass the inspection of packages mailed from abroad. And in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), the Court held that the Border Patrol may stop an automobile and briefly question its occupants at a permanent checkpoint near the border even in the absence of individualized suspicion that the vehicle contains illegal aliens.

The Court's treatment of searches and seizures of a civil or administrative nature is especially pertinent to the search in this case, since such searches generally are conducted in order to maintain discipline or to enforce observance of rules and regulations. In *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *See v. City of Seattle*, 387 U.S. 541 (1967), the Court held that both probable cause and a warrant are required before safety inspectors can inspect homes or commercial premises. Nevertheless, the Court significantly altered the standard for what constitutes probable cause in order to adjust the protections of the Fourth Amendment to the unique aspects of the context. See *Camara*, 387 U.S. at 534-539.

Subsequent administrative search cases have brought additional developments. Entry to inspect the premises

with neither a warrant nor *any* particularized suspicion is permitted pursuant to a legislative scheme for pervasively regulated industries. See *Donovan v. Dewey*, 452 U.S. 594 (1981) (inspection of mines); *United States v. Biswell*, 406 U.S. 311 (1972) (gun dealers); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (alcohol dealers). But cf. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (warrant required when obtaining one is not detrimental to enforcement of the regulatory scheme). Similarly, neither a warrant nor any individualized suspicion is required for the Coast Guard or Customs Service to board a vessel and examine its owner's documents, *United States v. Villamonte-Marquez*, *supra*; for police officers to inventory the contents of objects they have impounded. *Illinois v. Lafayette*, No. 81-1859 (June 20, 1983); *South Dakota v. Opperman*, 428 U.S. 364 (1976); for law enforcement officers to perform various "community caretaking" functions that include searches or seizures, *Cady v. Dombrowski*, 413 U.S. 433 (1973) (policemen searched car for service revolver of off-duty officer); *Harris v. United States*, 390 U.S. 234 (1968) (police officer discovered evidence while locking car); or for a caseworker to enter the home of a welfare recipient to ensure compliance with welfare regulations, *Wyman v. James*, 400 U.S. 309 (1971).

The "community caretaking" rationale also has been applied, at least in part, to the activities of firefighters. In *Michigan v. Tyler*, 436 U.S. 499 (1978), the Court held that a burning building creates an exigency that justifies a warrantless entry to fight the blaze, and that once in the building, officials need no warrant to remain for "a reasonable time to investigate the cause of a blaze after it has been extinguished." *Id.* at 510. Entries at a later time with the primary object of investigating the cause and origin of the fire may be made pursuant to the procedures established in *Camara* for administrative searches. *Tyler*, 436 U.S. at 511; *Michigan v. Clifford*, No. 82-357 (Jan. 11, 1984), slip op. 6. If, however, the primary object of a subsequent search

is to gather evidence of criminal activity such as arson, a criminal search warrant must be obtained. *Clifford*, slip op. 4, 6.

B. These decisions point the way to several important conclusions about the Fourth Amendment. First, many searches and seizures are "reasonable" within the meaning of the Fourth Amendment even if probable cause is lacking. No single standard represents "reasonableness" as that term is used in the Fourth Amendment; "the Fourth Amendment imposes no irreducible requirement of such suspicion." *Martinez-Fuerte*, 428 U.S. at 561.⁴ Rather, as the Court has long recognized, "[t]hese cases together establish that in appropriate circumstances the Fourth Amendment allows a properly limited 'search' or 'seizure' on facts that do not constitute probable cause * * *." *Brignoni-Ponce*, 422 U.S. at 881.

Second, "[t]he standard of probable cause is peculiarly related to criminal investigations, not routine, non-criminal procedures." *Opperman*, 428 U.S. at 370 n.5; see also *Ingraham v. Wright*, 430 U.S. 651, 673 n.42 (1977) (principal concern of Fourth Amendment is intrusions on privacy in course of criminal investigations); *Whalen v. Roe*, 429 U.S. 589, 604 n.32 (1977) (same); Note, *Warrantless Searches and Seizures of Automobiles*, 87 Harv. L. Rev. 835, 850-851 (1974). Consequently, the Court has not hesitated to uphold searches upon less than probable cause when the context requires alteration of the accommodation between individual and governmental interests reached in the criminal cases establishing the probable cause standard. Moreover, the mere fact that a search held reasonable on less than probable cause produces evidence that is subsequently used in criminal proceedings does not alter the requisite level of suspicion. See *Opperman*, 428 U.S. at 370-375; *Cady v. Dombrow-*

⁴ See also *Michigan v. Summers*, 452 U.S. at 699-700 & nn.11-12; *Brown v. Texas*, 443 U.S. 47, 51 (1979); *Dunaway v. New York*, 442 U.S. 200, 210 (1979); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

ski, supra; *Harris v. United States, supra*; *Abel v. United States*, 362 U.S. 217, 228-230 (1960).

Third, the balancing of individual and governmental interests to determine the reasonableness of a search or seizure under the Fourth Amendment is performed not as "a matter for case-by-case application, but rather as a technique for establishing the quantum of evidence needed for certain distinct kinds of official action." 3 W. LaFare, *Search and Seizure* § 9.1, at 14 (1978). The Court isolates the unique features of particular categories of searches, such as car searches, see *United States v. Ross*, 456 U.S. 798 (1982); *Chambers v. Maroney*, 399 U.S. 42 (1970); or searches by health inspectors, see *Camara v. Municipal Court, supra*, and prescribes the test of reasonableness for searches in that context. As we demonstrate below, a number of unique factors call for the placement of school searches in a special category, with the result that school officials seeking to enforce school rules and regulations need not demonstrate probable cause to satisfy the Fourth Amendment's standard of reasonableness.⁵

⁵ Because we argue that probable cause is not necessary to justify a search by a school administrator such as the one in this case, we shall not separately address the issue whether a warrant should be required. The language of the Fourth Amendment is quite clear that "no Warrants shall issue, but upon probable cause * * *." U.S. Const. Amend. IV. Thus, if a search is permitted on the basis of suspicion short of probable cause, no warrant can be required. See *Opperman*, 428 U.S. at 370 n.5. And even if the Court were to hold that probable cause is necessary for a school official to conduct a search in connection with school discipline, it still would not follow that a warrant should be required. The Court has created numerous exceptions to the warrant requirement. See, e.g., *United States v. Ross, supra* (automobile searches); *Vale v. Louisiana*, 399 U.S. 30 (1970) (exigent circumstances); *Chimel v. California*, 395 U.S. 752 (1969) (search incident to arrest). In general, these exceptions follow the principle that probable cause is sufficient protection when obtaining a warrant would be unduly complicated or difficult. See *Chambers v. Maroney*, 399 U.S. at 51; 2 W. LaFare, *Search and Seizure* § 4.1 (1978 & Supp. 1984). In addition, the warrant requirement may be waived when there is less necessity for a "neutral and detached magistrate" because the

II. A School Official Having Reasonable Suspicion That A Student Has Violated A School Rule May Conduct A Warrantless Search Of The Student's Effects⁶

A. It is beyond dispute that "students [do not] shed their constitutional rights * * * at the schoolhouse gate." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969). At the same time, however, this Court has recognized the unique nature of children and the school setting and has declined to "constitutionalize" the entire educational process.⁷ For

officials conducting the search are not "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948) (footnote omitted). Even respondent concedes that the warrant requirement should be waived in the school context because it "would be particularly difficult for schools to comply with because * * * schools are not primarily involved in investigating criminal conduct." Tr. of Oral Arg. 32 (Mar. 28, 1984).

⁶ We deal here with school searches of the type conducted in this case. Since it is clear, as we demonstrate in Part III of this brief, that the search of respondent's purse was supported by reasonable suspicion, it is unnecessary to consider the circumstances in which a lesser degree of suspicion might be constitutionally permissible. Such circumstances are easily imaginable, however, as, for example, in the case of a rumor that a student possessed a knife and intended to harm a teacher or another student.

⁷ The Court has recognized the self-evident proposition that children are different from adults outside of the school setting as well. In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court upheld a New York statute making it unlawful to sell obscene material to minors. As the Court observed (*id.* at 638 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944))), "even where there is an invasion of protected freedoms, 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'" The Court endorsed the view that "regulations of communication addressed to [children] need not conform to the requirements of the first amendment in the same way as those applicable to adults" (*Ginsberg*, 390 U.S. at 638 n.6 (quoting Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 939 (1963))).

Similarly, in rejecting a due process challenge to a New York statute authorizing pretrial detention of juveniles, the Court recently stressed the fundamental differences between children and

example, in *Ingraham v. Wright*, 430 U.S. 651 (1977), the Court held that the Eighth Amendment's proscription against cruel and unusual punishments does not extend to the imposition of corporal punishment as a method of disciplining public school students. Instead, the Court accepted the common law notion that "the State . . . may impose such corporal punishment as is reasonably necessary 'for the proper education of the child and for the maintenance of group discipline.'" *Id.* at 662 (quoting 1 F. Harper & F. James, *Law of Torts* § 3.20, at 292 (1956)).

So too, in *Goss v. Lopez*, 419 U.S. 565 (1975), the Court's holding that due process requires notice and a hearing before a child may be suspended from school was tempered by the recognition that the "hearing" could be quite "rudimentary" and could follow immediately the giving of "notice" (*id.* at 581-582). Indeed, the Court held that due process would be satisfied "[i]n the great majority of cases" simply by having "the disciplinarian . . . informally discuss the alleged misconduct with the student minutes after it has occurred" (*id.* at 582); the Court's only concern was that the accused student be "given an opportunity to explain his version of the facts" after first being apprised of the basis of

adults. The Court explained (*Schall v. Martin*, No. 82-1248 (June 4, 1984), slip op. 9 (citations omitted)):

We have held that certain basic constitutional protections enjoyed by adults accused of crimes also apply to juveniles. . . . But the Constitution does not mandate elimination of all differences in the treatment of juveniles. . . . The State has "a *parens patriae* interest in preserving and promoting the welfare of the child," *Santosky v. Kramer*, 455 U.S. 745, 766 (1982), which makes a juvenile proceeding fundamentally different from an adult criminal trial. We have tried, therefore, to strike a balance—to respect the "informality" and "flexibility" that characterize juvenile proceedings, *In re Winship*, [397 U.S. 358, 366 (1970)], and yet to ensure that such proceedings comport with the "fundamental fairness" demanded by the Due Process Clause.

the accusation (*ibid.*). But the Court was unwilling to impose more onerous requirements on school authorities (*id.* at 583):

We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.

In short, the Court has made it clear—both within the school context and without—that the panoply of constitutional protections guaranteed to adults cannot and should not be transplanted wholesale to children. As we demonstrate below, both history and common sense compel this conclusion in the context of school searches.

B. 1. On several occasions, "longstanding, historically recognized" practices have led the Court to uphold particular types of searches on less than probable cause. *United States v. Ramsey*, 431 U.S. at 621 (border searches). See also, e.g., *Villamonte-Marquez*, slip op. 6-8 (authority to board ships and inspect owners' documentation); *United States v. Biswell*, 406 U.S. at 314 (inspection of liquor dealer approved on the basis of "the historically broad authority of the Government to regulate the liquor industry"). The authority of school officials to supervise their students free of the full panoply of legal constraints imposed upon the actions of other state officials constitutes such a longstanding, historically recognized practice. That authority was established in

colonial times, and it has been exercised virtually unquestioned for over 200 years.⁸ See Ladd, "Regulating Student Behavior Without Ending Up In Court," reprinted in National Education Association, *Discipline and Learning: An Inquiry into Student-Teacher Relationships* 24, 25-28, 30 (1977); H. Falk, *Corporal Punishment* (1941); Proehl, *Tort Liability of Teachers*, 12 Vand. L. Rev. 723, 726-727 (1959). See generally, M. Katz, *Education in American History* (1973); J. Puliam, *History of Education in America* (1968).

This historically unbroken practice has its origins in the common law doctrine that teachers act *in loco parentis*. Proehl, *supra*, 12 Vand. L. Rev. at 723; 1 W. Ringel, *Searches & Seizures, Arrests and Confessions* § 17.2 (2d ed. 1984). Blackstone explained the meaning of the theory in 1769 (1 W. Blackstone, *Commentaries* *453):

[The father] may also delegate part of his parental authority, during his life, to the tutor or school-master, of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

The pure, Blackstonian version of the *in loco parentis* doctrine may no longer govern student/teacher relations in public schools. See pages 20-21, *infra*. Nonetheless, Blackstone's version of the doctrine remains the foundation for the contemporary notion that teachers must be left relatively free from rigid legal constraints to discipline students and enforce order in the schools.

⁸ This Court has previously held that "[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted * * *." *Ramsey*, 431 U.S. at 619 n.14 (quoting *Carroll v. United States*, 267 U.S. at 149). See also *Villamonte-Marquez*, slip op. 6-8 (quoting *Boyd v. United States*, 116 U.S. 616, 623 (1886)). It is extremely unlikely that the Framers of the Fourth Amendment ever intended the Amendment to serve as a Code of School Disciplinary Rules.

With specific regard to the issue of searches, it was not until 1969 that anyone appears to have raised the claim that the Fourth Amendment limited school officials in their actions at all.⁹ Commenting on the recent spate of litigation brought by students to challenge ordinary disciplinary practices, one educator remarked: "[T]he new situation it has created goes strongly counter to a tradition which is basic to American public school administration and threatens what most conscientious administrators have always been taught to believe is good professional practice." Ladd, "Regulating Student Behavior," *supra*, at 25. In recognition of this fact, state and lower federal courts have overwhelmingly approved the actions of school officials in cases like this one. See Busa, *The Fourth Amendment and Searches of Students in Public Schools*, 59 Iowa L. Rev. 739 & n.1 (1974) (citing cases); Comment, *Students and the Fourth Amendment: "The Torturable Class,"* 16 U.C. Davis L. Rev. 709, 709-710 & n.4 (1983) (citing cases). The nature of the school setting, discussed below, requires continued adherence to this long-standing tradition.

2. A reduced level of suspicion is reasonable within the meaning of the Fourth Amendment when the search is "not one by police or uniformed authority" and is "not a criminal investigation." *Wyman v. James*, 400 U.S. at 322-323; see also *Ingraham v. Wright*, 430 U.S. at 673 n.42; *Opperman*, 428 U.S. at 370 n.5. A school search is the paradigm of the noncriminal investigation. School officials are not charged with enforcement of the criminal laws, and they do not conduct searches for that purpose. Rather, their purpose is to maintain an institutional environment that facilitates learning. In a very real sense, moreover, a school official who conducts a search in order to preserve school safety and order, for the sake of maintaining an atmosphere conducive to education, does so as a surrogate for the student's parents. Saddling searches by school officials with all the

⁹ *In re Donaldson*, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969), appears to be the earliest case on the issue.

trappings of criminal proceedings would seriously weaken the officials' ability to fulfill the important and sensitive mission with which society has entrusted them.

We have previously noted the importance of the doctrine that teachers act *in loco parentis* as the historical foundation for relations between students and teachers. See pages 17-18, *supra*. In its pure, traditional version, authority to act *in loco parentis* is authority actually delegated to the teacher by the parent. See 1 W. Blackstone, *Commentaries* *453. Applied in this manner, courts have held that the Fourth Amendment no more restricts the teacher than it does the parent. See, e.g., *Mercer v. State*, 450 S.W.2d 715, 717 (Tex. Civ. App. 1970); *In re Donaldson*, 269 Cal. App. 2d 509, 510-513, 75 Cal. Rptr. 220, 221-223 (1969); 1 W. Ringel, *supra*, § 17.2, at 17-3.

Interpreted as an actual delegation of authority, the doctrine of *in loco parentis* does not fit easily within a compulsory system of education. See 1 W. Ringel, *supra*, § 17.2, at 17-5; Proehl, *supra*, 12 Vand. L. Rev. at 726-727. As numerous state courts have held, however, the doctrine is subject to a different interpretation that makes it a weighty factor in judging the reasonableness of actions of school officials. See, e.g., *In re W.*, 29 Cal. App. 3d 777, 782, 105 Cal. Rptr. 775, 778 (1973); *People v. Jackson*, 65 Misc. 2d 909, 910, 914, 319 N.Y.S.2d 731, 733, 736 (Sup. Ct. 1971), *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972); 1 W. Ringel, *supra*, § 17.2, at 17-6 n.17 (citing cases). The public school official acts *in loco parentis* in the sense that he assumes considerable responsibility for the welfare of his students. This Court recently noted that "juveniles, unlike adults, are always in some form of custody." *Schall v. Martin*, No. 82-1248 (June 4, 1984), slip op. 11. During school hours, this custody is committed to teachers and school officials. Along with custody, the teacher is charged with numerous affirmative obligations. Indeed, the responsibilities assumed by teachers, not merely to protect, but to socialize, educate, and foster moral development, are little short of awesome. Whether or not

delegated in the traditional, common law sense, the nature of the teacher's actual functions is undeniably "*in loco parentis*." It is in this sense that the *in loco parentis* doctrine retains vitality in the context of an inquiry into "reasonableness" for Fourth Amendment purposes. Interposing the full complement of Fourth Amendment procedural requirements between a teacher and his students can only frustrate the teacher's ability to fulfill his role. We believe, in other words, that having been given responsibilities like those of a parent, leeway must be given to teachers to exercise authority in a manner that might not be permitted of other state officials.¹⁰

While teachers are much more than "caretakers," the rationale of the "community caretaking" cases is especially apt here. A search by one with custody and control over the object searched may be permitted on the basis of less than probable cause because the additional responsibility associated with custody makes the search a reasonable course of action. See *Cady v. Dombrowski*, 413 U.S. at 442-443. This lowered threshold is reasonable in light of the nonadversarial nature of the relationship

¹⁰ The responsibility placed on school officials for the protection and well-being of students also supports the conclusion that students' reasonable expectations of privacy are substantially diminished while they are at school. The Fourth Amendment standard of reasonableness varies significantly depending upon the location of a search. It is true that "the Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). But it is equally true that a person's reasonable expectations of privacy vary greatly depending upon his location. See, e.g., *Hudson v. Palmer*, No. 82-1630 (July 3, 1984) (lowered expectation of privacy in prison); *Donovan v. Dewey*, 452 U.S. at 598-599 ("expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home"); *United States v. Ramsey*, 431 U.S. at 619-621 (border search is permissible on less than probable cause simply because it is at the border); *Opperman*, 428 U.S. at 367 (footnote omitted) ("the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office"). So too, the legitimate privacy expectations of a secondary school student at school are different from those the student may have on the street.

and the underlying purpose of protecting the interests of a larger group to whom the official conducting the search is responsible. Thus, in *Cady v. Dombrowski*, *supra*, the Court approved the search (without any suspicion of wrongdoing) of a car by police who were motivated by concern that the driver, an off-duty police officer, had left his service revolver in the car. The Court concluded that a search is reasonable without a warrant or probable cause when officers, responsible for and concerned with the public safety, conduct a search pursuant to such "community caretaking functions" (as distinguished from responsibility for "the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute"). *Id.* at 441-443. The analogous custody and responsibility of school officials for preserving order and discipline for students compels a similarly lowered threshold of suspicion for a search in the secondary school context.

As the Court has recognized, "[e]vents calling for discipline [in the public schools] are frequent occurrences and sometimes require immediate, effective action." *Goss v. Lopez*, 419 U.S. at 580. Unfortunately, that statement is more true today than ever before. There can be no gainsaying the importance of discipline to learning and educational achievement. See pages 23-24, *infra*. What may not be fully understood, however, is the extent to which the disorder in the nation's public schools now transcends the traditional difficulties of focusing a child's attention on learning. In 1978, the National Institute of Education (NIE), an agency of the Department of Education, reported that *each month* in America's secondary schools 282,000 students were physically attacked; 112,000 students were robbed by means of force, weapons, or threats; and 2,400,000 students had their personal property stolen. NIE, U.S. Dep't of Education, *1 Violent Schools—Safe Schools: The Safe School Study Report to the Congress* iii, 74-75 (1978) [hereinafter cited as *NIE Report*]. NIE also reported that almost 8% of urban junior and senior high school students

missed at least one day of school a month because they were afraid to go to school. *Id.* at 63.

With respect to secondary school disorder affecting teachers, NIE reported that each month 6,000 teachers were robbed; 1,000 teachers were assaulted seriously enough to require medical attention; 125,000 teachers were threatened with physical harm; and 125,000 teachers encountered at least one situation in which they were afraid to confront misbehaving students. *NIE Report* 64, 75.

These findings vividly illustrate the setting in which school searches, like the one in this case, are conducted. The sad truth is that many classrooms across the country are not temples of learning teaching the lessons of good will, civility, and wisdom that are central to the fabric of American life. To the contrary, many schools are in such a state of disorder that not only is the educational atmosphere polluted, but the very safety of students and teachers is imperiled. School searches—conducted in a prompt and informal way—are a vital means of protecting students and teachers from weapons and drugs and enforcing school disciplinary rules.

In addition to maintaining order for safety's sake, teachers must be able to teach. There is persuasive evidence that educational achievement in this country has undergone a serious decline in recent years. See generally National Comm'n on Excellence in Education, *A Nation At Risk: The Imperative For Educational Reform* (1983). In response to this decline, educators have identified as a major priority the need to reestablish discipline and end drug and alcohol abuse in the schools. As one recent study concluded (J. Coleman, T. Hoffer, & S. Kilgore, *High School Achievement—Public, Catholic, and Private Schools Compared* 186-187 (1982) (emphasis added)).

When study of the effects of school characteristics on achievement began on a broad scale in the 1960s, those characteristics that were most studied were the traditional ones * * *: per pupil expenditures as an overall measure of resources, laboratory facili-

ties, libraries, recency of textbooks, and breadth of course offerings. Those characteristics showed little or no consistent relation to achievement. *The characteristics of schools that are currently found to be related to achievement, in this study and others . . . , are academic demands and discipline.*

The "discipline" meted out by the criminal justice system, however, may be counterproductive in the secondary school context and is likely to undermine the best features of the teacher/student relationship. Although the ideal may not always be attainable, educators must strive to create an atmosphere of trust and friendship between students and school officials. "[E]motion enters the classroom via the teacher-child relationship. . . . Children develop strong attachments to teachers, as well as certain kinds of dependencies. The success of the teaching-learning process may depend, in part, on the nature of the emotional relationship between teacher and student." 2 *Encyclopedia of Educational Research* 558 (5th ed. 1982). Imposition of the formalities of the criminal law enforcement process on what should instead be "informal give-and-take between student and disciplinarian" (*Goss v. Lopez*, 419 U.S. at 584) can only be destructive of the educational ideal. See also *Wyman v. James*, 400 U.S. at 323 ("The [welfare] caseworker is not a sleuth but rather, we trust, is a friend to one in need.").¹¹

¹¹ A somewhat imperfect analogy may be drawn to the relationship between parole officers and parolees, a relationship that has led several courts to alter the degree of protection from searches and seizures ordinarily provided by the Fourth Amendment. In *Morrissey v. Brewer*, 408 U.S. 471, 478 (1972) (footnote omitted), this Court observed that "parole officers are part of the administrative system designed . . . to guide the parolee into constructive development." In recognition of this relationship, several courts of appeals have held that "parole officers have . . . broad powers to search parolees under their supervision." *Latta v. Fitzharris*, 521 F.2d 246, 248 (9th Cir.) (en banc), cert. denied, 423 U.S. 897 (1975). See *United States v. Thomas*, 729 F.2d 120 (2d Cir. 1984); *United States v. Scott*, 678 F.2d 32 (5th Cir. 1982); *United States v. Bradley*, 571 F.2d 787 (4th Cir. 1978). In language particularly

Finally, a relaxed level of suspicion for searches by school officials also is justified by the intense public scrutiny focused on the public schools. As the Court noted in *Ingraham v. Wright*, 430 U.S. at 670, "[t]he openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner." So too, the same factors make unreasonable searches of students' effects much less likely than may be the case with adults suspected of criminal activity. In the case of adults, the public at large is unlikely to be informed or especially concerned about possible abuses, and those individuals who are informed may not be in a position to exert pressure on the responsible authorities. In the case of school children, by contrast, a large and highly motivated segment of the public—parents with school-age children—is immediately aware of abuses, can effectively protest practices it regards as unreasonable, and—acting through local school boards—can hold teachers and administrators accountable. Given the availability of these effective political safeguards, there is no need for the judiciary to impose rigid constraints on school officials in their day-to-day work.

For all these reasons, therefore, the school context is one in which no more than reasonable suspicion that a

apropos to this case, the Second Circuit explained the rationale behind this extra authority (*Thomas*, 729 F.2d at 123 (emphasis added)):

A parolee's diminished Fourth Amendment protection regarding searches by a parole officer arises from the necessity for effective parole supervision and the unique relationship of the parole officer and the parolee. . . . A parolee is in the legal custody of a parole officer who monitors the parolee's adherence to the conditions of his or her parole.

See also *Scott*, 678 F.2d at 34 ("As the official primarily charged . . . with guiding the parolee during his reorientation," greater latitude in searching is permitted to the parole officer); *Latta*, 521 F.2d at 249 ("The purposes of the parole system give the parole authorities a special and unique interest in invading the privacy of parolees under their supervision.").

rule is being violated should be necessary to support a search by a school official acting in that capacity.

III. The Assistant Vice Principal's Search Of Respondent's Purse In This Case Was Justified By Reasonable Suspicion

School officials possess the requisite "reasonable suspicion" to search a student's effects when "they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" that the student has violated a school rule. *Brignoni-Ponce*, 422 U.S. at 884. That standard clearly was met in this case. The assistant vice principal received an eyewitness report from an unquestionably credible source (a teacher) that respondent had violated a school regulation by smoking in the restroom. Respondent's denial, and her claim that she was a non-smoker, were hardly sufficient, without more, to overcome the reasonable suspicion generated by the teacher's report. Opening respondent's purse to determine whether its contents might reveal the truth of the matter in dispute was surely reasonable under the circumstances.¹²

¹² Moreover, the record reveals that Mr. Choplick acted out of concern for fairness to respondent (9/26/80 Tr. 30-31):

Q. * * * What was your sole intention when you opened that pocketbook?

A. The intent that I've always tried to do is that whenever I'm going to discipline anyone I try to give them a hearing, which I thought was part of my responsibility. I just don't normally hand out punishment.

* * *

A. When she said to me she wasn't smoking, all right, that was to me to see if there was any proof that she was. I didn't have a teacher there, and so my intent was to see if there was cigarettes inside, which would be a sign to me that she was smoking.

Q. Had you not found the cigarettes what would you have done?

A. I probably would have called back [the teacher] and asked her had she definitely saw her smoking.

It thus appears that Mr. Choplick was engaged in much the sort of "informal give-and-take between student and disciplinarian"

The New Jersey court erroneously characterized the assistant vice principal's reasonable suspicion as "at best, a good hunch" (Pet. App. 12a). But the teacher's eyewitness report that respondent had been smoking, coupled with the rational inference that a person who has recently been smoking is likely to possess additional cigarettes, amounted to far more than "a good hunch."¹³ The Supreme Court of New Jersey thus plainly erred when it stated that "[t]he contents of the handbag had no direct bearing on the infraction" (*ibid.*). The court apparently based its holding on the ground that "[m]ere possession of cigarettes did not violate school rule or policy" (*ibid.*), thus suggesting that the validity of the

mandated by this Court in *Goss v. Lopez*, 419 U.S. at 584. Clearly, he was acting as "a fair-minded school principal" (*id.* at 583) in order to avoid the unwarranted imposition of disciplinary sanctions. Respondent contends that Mr. Choplick should have disciplined respondent without opening her purse (see Tr. of Oral Arg. 43-44 (Mar. 28, 1984)), but we question the educative value of a lesson that teaches that students are always to be disbelieved.

¹³ In the trial court, respondent's counsel conceded that it was reasonable for the assistant vice principal to open respondent's purse (9/26/80 Tr. 55-56 (emphasis added)):

What were the reasonable action[s] that Mr. Choplick should have taken? Here's the way I see it, your Honor, in this regard: T. went into Mrs., Miss Wrigley's office, she was asked to turn over her pocketbook. As soon as the pocketbook was unzipped and behold, sitting up on top was a pack of Marlboro cigarettes. *That was enough. He should never have removed those cigarettes. No reason to delve around in that pocketbook beyond that point and everything that happened thereafter was improper, beyond the scope of the search. The suspicion was smoking. There was a denial of smoking. The purpose of the search was to see if there was some kind of smoking apparatus * * * and that was enough.*

They [the cigarettes] should never have been removed.

In our submission, it borders on the absurd to contend that, while it was reasonable to open respondent's purse, Mr. Choplick violated the Constitution when he lifted the Marlboros out to confront her with them. And, as we discuss in text, once the Marlboros had been removed, Mr. Choplick acquired probable cause (not merely reasonable suspicion) for a complete search of respondent's purse.

search depended on whether its object was the discovery of contraband. It thus appears that the state court has revived some version of the "mere evidence" rule rejected by this Court in *Warden v. Hayden*, 387 U.S. 294, 300-310 (1967).¹⁴ That the possession of cigarettes did not violate any school rule is, however, irrelevant; the controlling question is whether respondent's possession of cigarettes would aid in establishing a violation of the prohibition against smoking in the restrooms. *Id.* at 307. The answer to that question is clearly affirmative. Moreover, it was not necessary that the assistant vice principal search only for evidence that would have established a violation conclusively.¹⁵ Quite clearly, the contents of respondent's purse could reasonably have been believed by the assistant vice principal to have a bearing on the credibility of respondent's assertion that she did not smoke and, hence, on the credibility of her denial of having committed the infraction.

The New Jersey court also erred in its suggestion (Pet. App. 12a) that even if it was reasonable for the assistant vice principal to have opened respondent's purse, the balance of the search was unreasonable. While acknowledging that the sight of rolling papers in plain view could justify looking for drugs, the court went on to state that observation of the rolling papers could not

¹⁴ Of course, even when the "mere evidence" rule held sway, it was permissible to search not only for contraband but for fruits and instrumentalities of an offense. See *Warden v. Hayden*, 387 U.S. at 300-301. It seems likely that the cigarettes in respondent's purse would be classified as instrumentalities of the smoking infraction.

¹⁵ See, e.g., *United States v. Holland*, 510 F.2d 453, 455 (9th Cir.), cert. denied, 422 U.S. 1010 (1975) (footnote omitted), in which the court stated:

Clearly, the officers were not required to rule out all possibility of innocent behavior before initiating a brief stop and request for identification. The test is founded suspicion * * *. Even if it was equally probable that the vehicle or its occupants were innocent of any wrongdoing, police officers must be permitted to act *before* their reasonable belief is verified by escape or fruition of the harm it was their duty to prevent.

justify "wholesale rummaging or browsing through a person's papers in the unparticularized hope of uncovering evidence of a crime." *Ibid.* (quoting *State v. Smith*, 113 N.J. Super. 120, 135, 273 A.2d 68, 76-77 (1971)). But the search of respondent's purse cannot be compartmentalized any more than the search of an automobile. See, e.g., *United States v. Ross*, 456 U.S. at 820-821. Once the assistant vice principal saw the rolling papers, he had probable cause (not merely reasonable suspicion) to believe that respondent possessed marijuana, and he was justified in searching her entire purse for evidence of drug dealing.

If, as the New Jersey court in essence held, school officials lack reasonable grounds to conduct a search when a student simply denies a teacher's eyewitness account of an infraction, students will deny such charges routinely. The result will be the same as if the Court adopted a probable cause standard for school searches; as we have shown above, that standard is wholly inappropriate in the school context.

CONCLUSION

The judgment of the Supreme Court of New Jersey should be reversed.

Respectfully submitted.

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Solicitor General

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Deputy Solicitor General

KATHRYN A. OBERLY

Assistant to the Solicitor General

JULY 1984

No. 83-712-CSY
Status: GRANTED

Title: New Jersey, Petitioner
v.
T.L.O.

ocketed:
October 7, 1983

Court: Supreme Court of New Jersey

Counsel for petitioner: Nides, Allan J.

Counsel for respondent: De Julio, Lois A.

Entry	Date	Note	Proceedings and Orders
1	Oct 7 1983	G	Petition for writ of certiorari filed.
2	Nov 7 1983	G	Motion of respondent for leave to proceed in forma pauperis filed.
3	Nov 7 1983		Brief of respondent T.L.O. in opposition filed.
4	Nov 9 1983		DISTRIBUTED. November 23, 1983
5	Nov 28 1983		Motion of respondent for leave to proceed in forma pauperis GRANTED.
6	Nov 28 1983		Petition GRANTED.
8	Jan 9 1984		***** Order extending time to file brief of petitioner on the merits until January 17, 1984.
9	Jan 12 1984	G	Motion of National School Boards Association for leave to file a brief as amicus curiae filed.
10	Jan 12 1984	G	Motion of Washington Legal Foundation for leave to file a brief as amicus curiae filed.
11	Jan 12 1984	G	Motion of New Jersey School Boards Association for leave to file a brief as amicus curiae filed.
12	Jan 16 1984		Brief of petitioner New Jersey filed.
13	Jan 16 1984		Joint appendix filed.
14	Jan 23 1984		Motion of National School Boards Association for leave to file a brief as amicus curiae GRANTED.
15	Jan 23 1984		Motion of Washington Legal Foundation for leave to file a brief as amicus curiae GRANTED.
16	Jan 23 1984		Motion of New Jersey School Boards Association for leave to file a brief as amicus curiae GRANTED.
17	Jan 30 1983		Leave to file respondent's brief on the merits in excess of the page limits filed with WJB (A-611).
18	Jan 30 1984		Record filed.
19	Jan 31 1984		Order granting leave to file respondent's brief on the merits not to exceed 65 pages by Justice Brennan.
21	Feb 9 1984		Brief of respondent T.L.O. filed.
22	Feb 14 1984		SET FOR ARGUMENT. Wednesday, March 28, 1984. (3rd case)
23	Feb 16 1984		Brief amicus curiae of ACLU, et al. filed.
24	Feb 27 1984		CIRCULATED.
25	Mar 21 1984	X	Reply brief of petitioner New Jersey filed.
26	Mar 28 1984		ARGUED.
27	Jul 5 1984		The case is restored to the calendar for reargument. In addition to the question presented by the petition for writ of certiorari and previously briefed and argued, the parties are requested to brief and argue the following question: Did the assistant principal violate
28	Jul 5 1984		
29	Jul 5 1984		

Entry	Date	Note	Proceedings and Orders
30	Jul 5 1984		the Fourth Amendment in opening respondent's purse in the facts and circumstances of this case? Justice Blackmun dissents. Dissenting opinion by Justice Stevens, with whom Justice Brennan and Justice Marshall join.
31	Jul 5 1984		The briefing schedule on reargument is as follows: July 30, 1984 - Petitioner's brief is to be filed and served in typewritten form. Aug. 4, 1984 - Petitioner's brief must be filed and served in printed form. Aug. 24, 1984 - Petitioner's brief is to be filed and served in typewritten form. Aug. 29, 1984 - Petitioner's brief must be filed and served in printed form.
32	Jul 5 1984		Motion of New Jersey School Boards Association for leave to file a brief as amicus curiae filed.
33	Jul 5 1984		Motion of National School Boards Association for leave to file a brief as amicus curiae filed.
34	Jul 5 1984		Motion of National Association of Secondary School Principals for leave to file a brief as amicus curiae filed.
35	Jul 5 1984		Supplemental brief of petitioner New Jersey on reargument filed.
36	Jul 30 1984	G	Brief amicus curiae of United States filed.
37	Jul 30 1984	G	SET FOR REARGUMENT. Tuesday, October 2, 1984. (1st case)
38	Jul 30 1984	G	Motion of National School Boards Association for leave to participate in oral argument as amicus curiae filed.
39	Jul 30 1984		Supplemental brief of respondent T.L.O. on reargument filed.
40	Jul 31 1984		CIRCULATED.
41	Aug 10 1984		Motion of Legal Aid Society of the City of New York, et al. for leave to file a brief as amici curiae filed.
42	Aug 20 1984	D	Motion of National Education Association for leave to file a brief as amicus curiae filed.
44	Aug 22 1984		Supplemental brief of respondent T.L.O. on reargument filed.
45	Aug 22 1984		CIRCULATED.
46	Aug 23 1984	G	Motion of Legal Aid Society of the City of New York, et al. for leave to file a brief as amici curiae filed.
47	Aug 24 1984	G	Motion of National Education Association for leave to file a brief as amicus curiae filed.
48	Aug 29 1984	X	Brief amicus curiae of American Civil Liberties Union, et al. filed.
49	Aug 29 1984		Opposition of respondent to motion of National School Boards Association for leave to participate in oral argument as amicus curiae filed.
50	Sep 4 1984		Opposition of petitioner to motion of National School Boards Association for leave to participate in oral argument as amicus curiae filed.
51	Sep 18 1984		Motion of New Jersey School Boards Association for leave to file a brief as amicus curiae GRANTED.
52	Sep 18 1984		Motion of National Association of Secondary School Principals for leave to file a brief as amicus curiae GRANTED.
53	Sep 18 1984		Motion of National School Boards Association for leave to file a brief as amicus curiae GRANTED.
54	Sep 18 1984		Motion of National School Boards Association for leave to participate in oral argument as amicus curiae DENIED.
55	Sep 17 1984	D	Motion of Los Angeles County Public Defender's Office for leave to file a brief as amicus curiae, out-of-time

Entry	Date	Note	Proceedings and Orders
56	Oct 1 1984		filed.
57	Oct 1 1984		Motion of Legal Aid Society of the City of New York, et al. for leave to file a brief as amici curiae GRANTED.
58	Oct 1 1984		Motion of National Education Association for leave to file a brief as amicus curiae GRANTED.
60	Oct 2 1984		Motion of Los Angeles County Public Defender's Office for leave to file a brief as amicus curiae, out-of-time DENIED. REARGUED.

20
No. 83-712

Office - Supreme Court, U.S.
FILED

AUG 22 1984

ALEXANDER L. STEWAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF NEW JERSEY,

Petitioner,

v.

T.L.O., A Juvenile,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of New Jersey

SUPPLEMENTAL BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Did the assistant principal violate the Fourth Amendment in opening respondent's purse in the facts and circumstances of this case?

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SUPPLEMENTAL BRIEF FOR RESPONDENT

SUMMARY OF ARGUMENT

The Fourth Amendment protects against unreasonable searches conducted by any governmental agent. Because public school personnel are employed by the State, act with State authority, and are responsible for enforcing State laws and regulations, their conduct constitutes governmental, rather than private, action. Thus, the New Jersey Supreme Court properly ruled that the search of T.L.O. by the assistant principal came within the ambit of the Fourth Amendment.

The Fourth Amendment proscribes all unreasonable governmental searches; however, the procedures and circumstances which would render a search unreasonable are not identical in all situations. To determine whether a given category of official search is constitutionally reasonable, this Court has, historically, utilized a balancing test weighing the governmental interest which motivates the search against the constitutionally protected interests of the citizen. Once a determination is made that the governmental interest justifies the intrusion into the individual's protected area of privacy, then the nature and extent of the search must be appropriately defined in light of the purpose it serves. In defining Fourth Amendment standards in particular contexts, this Court has consistently limited the scope of the intrusion in those circumstances where it has found a lesser standard than probable cause to be constitutionally permissible.

In applying this balancing test to the school setting, the New Jersey Supreme Court considered such governmental concerns as the duty of educators to maintain order, discipline, and safety in the schools, the fact that school officials are not primarily concerned with law enforcement, and the necessity for immediate action when threats to the school environment arise. In view of these educational duties, the New Jersey Supreme Court correctly ruled that a student's Fourth Amendment rights do not preclude school officials from conducting searches when necessary to carry out their educational responsibilities, and that neither a warrant nor the strict probable cause standard was required in the school setting. On the

other hand, the court properly concluded students' right to privacy required that no search be conducted unless the teacher has reasonable grounds to believe that the student possesses evidence of illegal activity or activity that would interfere with school discipline and order. Furthermore, as the nature of the intrusion intensifies, the definition of "reasonable grounds" approaches that of probable cause.

Petitioner's contention to the contrary notwithstanding, students retain a substantial expectation of privacy in their persons while in school. To be deemed legitimate an expectation of privacy cannot merely be subjective, but must also be one that society is prepared to recognize as reasonable. However, the mere fact that a place is defined to be "public" for Fourth Amendment purposes does not mean that an individual renounces all reasonable expectation of privacy upon entry.

Applying the analysis of *Hudson v. Palmer*, — U.S. —, 52 U.S.L.W. 552 (July 3, 1984) to the school setting, it is clear that the goals and purposes of the public school system are not in conflict with a scrupulous observance of students' rights to personal privacy; indeed conscientious protection of students' constitutional rights affirmatively assists schools in their goals of fostering social responsibility, and preventing delinquency. The majority of lower courts have concluded that the responsibilities and operational concerns of the public school system are not incompatible with respect for the personal integrity of the students, and can be adequately accommodated by eliminating the warrant requirement and allowing school personnel to conduct searches on the basis of the lesser, reasonable grounds standard. No further reduction in the students' right to personal privacy has been deemed necessary.

Similarly, empirical evidence supports the conclusion that schools can be safely operated and an effective educational environment can be maintained without stripping students of all but the minimal right to privacy which petitioner suggests. Moreover, this evidence suggests that arbitrarily exposing students to the traumatic experience of a personal search will affect their emotional well-being. Failure to set standards to

prevent unnecessary searches is contrary to the duty of educators to safeguard the emotional health of the children in their care.

Since observance of individual rights is not incompatible with the goals of the educational system, and will not interfere with the safe and effective operation of the schools, it is clear that a student's substantial expectation of privacy is reasonable. Construing the reasonable grounds standard in light of the students' legitimate expectation of privacy, and applying it to the facts of the instant case compels the conclusion that the search of T.L.O.'s purse was unconstitutional. The assistant principal had no reasonable grounds to believe that the student's purse contained evidence of criminal activity or activity that would disrupt school order. Possession of tobacco cigarettes was not in violation of school rules, and would not have constituted evidence that T.L.O. had been smoking in the girls' restroom. Moreover, the infraction itself did not pose a threat to school safety and order sufficient to warrant the extreme measure of a personal search.

Assuming, *arguendo*, that the assistant principal had some reasonable grounds to open the student's pocketbook, the resulting search exceeded the constitutionally permissible scope. The package of tobacco cigarettes was at the top of the purse. The vice-principal's immediate observation fulfilled whatever evidential purpose it might be supposed that the package would serve. He had no valid reason to seize the packet, and had he not done so, he would not have seen the cigarette rolling papers.

Even assuming that the principal's actions to this point were legal, his seizure of the student's personal papers cannot be justified under the plain view exception. The relationship of the papers to the drug offense was not immediately apparent and could not be readily determined from mere inspection.

LEGAL ARGUMENT

POINT I

IN THE FACTS¹ AND CIRCUMSTANCES OF THIS CASE, THE ASSISTANT PRINCIPAL VIOLATED THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION BY SEARCHING RESPONDENT'S PURSE.

This case arises from a criminal prosecution in which the State of New Jersey attempted to utilize on its case-in-chief evidence seized from the juvenile-respondent, T.L.O., by the Assistant Principal of her high school. When the Supreme Court of New Jersey ruled that the evidence seized from the juvenile could not be used against her, petitioner chose to apply for *certiorari* on the basis of only one aspect of that decision, *i.e.*, whether the exclusionary rule should be applied to the fruits of an illegal search conducted by a public school official.

At oral argument, petitioner affirmed that "our quarrel with the Supreme Court of New Jersey is that we do not feel that the exclusionary rule works as a deterrent in the school search situation. . ." (Tr. of Oral Arg. 8-7 to 9) Petitioner noted that "we agree with the standard that was set forth by the New Jersey Supreme Court," describing it as "a good standard and a workable standard." (Tr. of Oral Arg. 11-3 to 4) Indeed, in its most recent brief, petitioner apparently continues to endorse the "reasonable grounds" standard enunciated by the New Jersey Supreme Court, taking issue only with the lower court's application of this standard to the facts of the case. Supplemental Brief of Petitioner at 7-8. It is therefore somewhat puzzling that petitioner at this belated stage of the proceedings now asserts that the Fourth Amendment does not apply at all to a search conducted by a school official. See Supplemental Brief of Petitioner at 9.

¹ A full summary of the facts adduced at trial is contained in the Statement of the Case set forth in respondent's initial brief, previously filed with this Court.

Respondent nevertheless submits that the actions of Assistant Principal Choplik constituted governmental action within the ambit of the Fourth Amendment, and that the search of T.L.O.'s purse violated the constitutional proscription against unreasonable searches.

A. Searches Conducted By School Personnel Constitute Governmental Rather Than Private Action And Are Therefore Subject To The Fourth Amendment.

The Supreme Court of New Jersey held that searches of students by school employees constitute governmental action subject to the regulation of the Fourth Amendment. *State in the Interest of T.L.O.*, 94 N.J. 331, 463 A.2d 934, 939 (1983). This ruling is in accordance with the decisions of the great majority of lower federal and state courts which have considered this question.

The argument and authority in support of this conclusion have been set forth at length in respondent's initial brief. In the interest of brevity, those materials will not be reprinted here; instead, respondent would respectfully refer the Court to Point II A of her original brief at 16-23.²

B. A School Official Cannot Search A Student Unless He Has Reasonable Grounds To Believe That The Student Possesses Evidence Of Illegal Activity Or Activity That Would Interfere With School Order.

Having held that the Fourth Amendment does apply to the conduct of the public school personnel, the New Jersey Su-

² Respondent would, in addition, call the Court's attention to *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). In *Ambach*, this Court, in context of a challenge to a state law which required teachers to be American citizens, determined that "teaching in the public schools constitutes a governmental function" [*Id.*], such that a state could properly impose a requirement of citizenship. Respondent submits that this decision supports her position that public school personnel are governmental agents, and must be considered as such for Fourth Amendment purposes as well.

preme Court nevertheless declined to impose upon school officials the warrant/probable cause requirements traditionally applied to the police. Instead it ruled that "when a school official has reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order, the school official has the right to conduct a reasonable search for such evidence." *State in the Interest of T.L.O.*, *supra*, 463 A.2d at 941-42. Further, to determine whether the school official had reasonable grounds, a reviewing court should take into consideration the following factors: The probative value and reliability of the information used as justification for the search; the exigency to make the search without delay; the child's age, history and school record; the prevalence and seriousness of the problem in the school to which the search was directed. *Id.* at 942.

In so ruling, the New Jersey Supreme Court specifically excluded from the ambit of its decision school searches conducted by or at the instigation of the police for the purpose of gathering evidence for a criminal prosecution. *Id.* at 941. The decision creates "a narrow band of administrative searches to achieve educational purposes." (emphasis supplied). *Id.* at 940. The state court also warned that as the intrusiveness of the search increases, the reasonableness standard approaches probable cause. *Id.* at 942. Respondent submits that under these circumstances, the standard delineated by the New Jersey Supreme Court is constitutionally required and urges that it be upheld.³

³ Respondent asserted below that the standard of probable cause was constitutionally required in the circumstances of this case. The reasons supporting the position taken by respondent in the state court have been set forth in the original brief filed on her behalf at 31, n. 18. They still have validity.

However, respondent recognizes that only one court has applied the probable cause/warrant standard to a student search conducted by school personnel in the performance of their educational responsibility to maintain an orderly and safe school environment. See *State v.*

It is axiomatic that the Fourth Amendment proscribes all unreasonable governmental searches. *Katz v. United States*, 389 U.S. 347, 357 (1967). The procedures and circumstances which would render a search reasonable for Fourth Amendment purposes are not, however, identical in all situations; the "specific content and incidents of this right must be shaped by the context in which it is asserted." *Terry v. Ohio*, 392 U.S. 1, 9 (1968). For example, to pass constitutional muster, a search by a police officer for contraband or evidence of crime must be shown to have been undertaken on the basis of probable cause, and to have been conducted pursuant to a warrant unless exigent circumstances rendered the obtaining of a warrant impossible. *South Dakota v. Opperman*, 428 U.S. 364, 370 n.5

Mora, 307 So.2d 317 (La. 1975), vac. 423 U.S. 309 (1975), remand 330 So.2d 900 (La. 1976). Compare e.g. *Picha v. Wielgos*, 410 F. Supp. 1214 (N.D. Ill. 1976); *Piazzola v. Watkins*, 316 F. Supp. 624 (M.D. Ala. 1970), aff'd 442 F.2d 284 (5th Cir. 1971); *Waters v. United States*, 311 A.2d 385 (D.C. App. 1973); *M.J. v. State*, 399 So.2d 996 (Fla. Dist. Ct. App. 1981); *People v. Bowers*, 72 Misc. 2d 800, 339 N.Y.S.2d 783 (N.Y. Crim. Ct. 1973); (all imposing the traditional probable cause test when the search was conducted or instigated by the police). See also *Horton v. Goose Creek Ind. School Dist.*, 690 F.2d 470, 481 (5th Cir. 1982) cert. den. ____ U.S. ____, 103 S.Ct. 3536 (1983), and *Doe v. Renfrew*, 475 F. Supp. 1012, 1021 (N.D. Ind. 1979), mod. 631 F.2d 91 (7th Cir. 1980), reh. den. 635 F.2d 582 (7th Cir. 1980), cert. den. 451 U.S. 1022 (1980), (distinguishing between searches conducted by school authorities in furtherance of the duty to maintain a safe environment conducive to education, and searches by school personnel in which there is some component of law enforcement activity in the searcher's actions.)

Furthermore, the reasonable grounds test as formulated by the New Jersey Supreme Court — excluding searches with police involvement and recognizing that the more intrusive the nature of the search the more nearly the reasonable grounds asserted will have to approach probable cause — addresses many of the concerns which prompted respondent to suggest adoption of the probable cause standard below. Thus respondent now urges this Court to affirm the decision of the New Jersey Supreme Court in this matter.

(1976). However, certain classes of administrative search, *i.e.*, where the primary purpose of the search is something other than the apprehension of criminals or the investigation of crimes, have been authorized on the basis of standards less than probable cause, although the requirement of a warrant has been retained. See *Michigan v. Tyler*, 436 U.S. 499, 507, n.5 (1978). A "frisk" for weapons, on the other hand, can be constitutionally conducted without the necessity of demonstrating probable cause or of obtaining a warrant, if the police officer can show that he had a reasonable suspicion that a suspect was armed and dangerous. *Terry v. Ohio*, *supra* at 27.

To determine whether and under what circumstances a given category of official search is constitutionally reasonable, this Court has, historically, utilized a balancing test, weighing the governmental interest which motivates the search against the constitutionally protected interests of the citizen. See *e.g.*, *Camara v. Municipal Court*, 387 U.S. 523, 534 (1967); *Terry v. Ohio*, *supra* at 21-22. Once a determination is made that the governmental interest justifies the intrusion into the individual's constitutionally protected area of privacy, then the nature and extent of the intrusion must be appropriately limited in light of the purpose it serves. *Id.* at 19-20.

This balancing test was the identical approach taken by the Supreme Court of New Jersey in the opinion below. *State in the Interest of T.L.O.*, *supra* at 941-42. After considering such governmental concerns as the duty of educators to maintain order, safety and discipline in the schools, the necessity of creating a proper educational atmosphere, the fact that educators are not primarily concerned with law enforcement, and the necessity for immediate action when threats to the educational environment arise, the New Jersey Supreme Court ruled that a student's Fourth Amendment rights do not, in the school context, preclude school officials from conducting searches when necessary to carry out these responsibilities. Moreover, in light of these educational concerns, neither a warrant nor the strict probable cause standard was constitutionally required in the school setting. However, the students' right to

privacy required that no search be conducted unless the teacher has reasonable grounds to believe that the student possesses evidence of illegal activity or activity that would interfere with school discipline and order. *Id.* at 941-42.

The majority of lower federal and state courts, which have considered the school search issue have taken the same approach and have come to the same conclusion, dispensing with the warrant requirement and permitting searches upon a lesser standard the same as, or akin to that formulated by the New Jersey Supreme Court.⁴ In concluding that this standard

⁴ See *e.g.*, *Bilbrey v. Brown*, No. 81-3008 (9th Cir. Aug. 2, 1984); *Horton v. Goose Creek Ind. School Dist.*, 690 F.2d 470, 481 (5th Cir. 1982), *cert. den.* — U.S. —, 103 S.Ct. 3536 (1983) (the school official must have "reasonable cause for his action"); *M.M. v. Anker*, 477 F. Supp. 837 (E.D. N.Y. 1979), *aff'd* 607 F.2d 588 (2nd Cir. 1979) ("reasonable suspicion"); *Jones v. Latexo Ind. School Dist.*, 499 F. Supp. 223-236 (E.D. Tex. 1980) ("reasonable cause to believe contraband would be found"); *Bellnier v. Lund*, 438 F. Supp. 47, 53 (N.D.N.Y. 1975) ("some articulable facts which together provided reasonable grounds to search the student"); *Doe v. Renfrew*, 475 F.Supp. 1012, 1021 (N.D. Ind. 1979), *mod.* 631 F.2d 91 (7th Cir. 1980), *reh. den.* 635 F.2d 582 (7th Cir. 1980), *cert. den.* 451 U.S. 1022 (1980) ("reasonable cause to believe"); *M. v. Bd. of Education Ball-Chatham, etc. Dist. No. 5*, 529 F. Supp. 288 (S.D. Ill. 1977) ("reasonable cause to believe"); *In re W.*, 29 Cal. App. 3d 777, 782, 105 Cal. Rptr. 775 (D.Ct. App. 1973) (the search "must be reasonable under the facts and circumstances of the case"); *State v. Baccino*, 282 A.2d 869, 872 (Det. Super. Ct. 1971) ("reasonable suspicion"); *State v. D.T.W.*, 425 So.2d 1383, 1386 (Fla. D. Ct. App. 1983) ("reasonable subjective suspicion supported by objective, articulable facts [which] would lead a reasonably prudent person to suspect" the presence of contraband); *People v. Ward*, 62 Mich. App. 46, 233 N.W.2d 180, 183 (Mich. Ct. App. 1975) ("reasonable suspicion"); *Doe v. State*, 88 N.M. 347, 540 P.2d 827, 832 (Sup. Ct. 1975) ("reasonable suspicion that a crime is being committed . . . or . . . reasonable cause to believe that the search is necessary in the aid of maintaining school discipline"); *State in the Interest of G.C.*, 121 N.J. Super. 108, 296 A.2d 102

was adequate to protect both the legitimate interests of the state and the privacy rights of the students, these courts considered many of the same factors that were noted by the court in *State in the Interest of T.L.O.*, *supra*, as well as others which arise in the school search context. *See e.g.*, *State v. McKinnon*, *supra* at 784, and *Doe v. State*, *supra* (duty of educators to investigate unlawful acts on school premises), *In the Interest of J.A.*, 85 Ill. App.3d 567, 406 N.W. 2d 958, 962 (App. Ct. 1980) (the health and welfare of the students in the school's charge); *Jones v. Latexo Ind. School Dist.*, *supra* at 236 ("the unique role of education in our society"); *State v. Baccino*, *supra* at 871, *Interest of L.L.*, *supra* at 349, *People v. Scott D.*, *supra* at 406-08, and *People v. Jackson*, *supra*, 319 N.Y.S. 2d at 734-35 (the modified *in loco parentis* relationship between teacher and student); *Doe v. State*, *supra*, 540 P.2d at 830 (the "epidemic" of crime in the schools); *People v. Scott D.*, *supra* (the "lethal" threat of drug abuse on the increase in schools; the immaturity of students).

(J.D.R.C. 1972) ("reasonable suspicion"); *People v. Jackson*, 65 Misc.2d 909; 319 N.Y.S.2d 731 (App. Term 1971), *aff'd* 30 N.Y.2d 734, 333 N.Y.S.2d 167 (Ct. App. 1972) ("reasonable grounds for suspecting something unlawful was being committed, or about to be committed"); *People v. Scott D.*, 34 N.Y.2d 483, 358 N.Y.S.2d 403, 408 (Ct. App. 1979) ("sufficient cause to search"); *State v. McKinnon*, 88 Wash.2d 75, 558 P.2d 781 (1977) ("reasonable grounds to believe the search is necessary in the aid of maintaining school discipline and order"); *Interest of L.L.*, 90 Wis. App.2d 585, 280 N.W.2d 343, 351 (Ct. of App. 1979) ("a reasonable suspicion that a student has a dangerous or illegal item or substance in his possession"). *See also* Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 Iowa L.Rev. 739 (1974); Comment, *Students and the Fourth Amendment: Myth or Reality?*, 46 U.M.K.C. L. Rev. 282 (1977); Comment, *Students and the Fourth Amendment?* 46 U.M.K.C. L.Rev. 282 (1977); Comment, *Students and the Fourth Amendment: "The Torturable Class,"* 16 U.C.D. L.Rev. 709 (1983) (hereinafter, "*The Torturable Class*").

Thus the considerations unique to searches in the school context have been recognized and accommodated by the elimination of the warrant requirement and the use of a standard less than probable cause. On the other hand, it was determined that the students' Fourth Amendment rights to privacy need not be compromised any further in order to implement the government's interest in providing appropriate educational environment.

Similarly, in deciding that as the nature of the intrusion intensifies, the definition of "reasonable grounds" approaches that of probable cause, the New Jersey Supreme Court followed the same approach used by this Court in defining Fourth Amendment standards in particular contexts. In those circumstances where a lesser standard has been found to be constitutionally permissible, the scope of the resulting intrusion has been limited. Thus, a police officer who has a reasonable suspicion that a suspect is armed and dangerous may only conduct a "pat-down" strictly limited to locating weapons; a full search of the suspect would still require probable cause, and a warrant or exigent circumstances. *Terry v. Ohio*, *supra* at 26.

In the area of border searches, a full search of an automobile to determine if it is carrying illegal aliens requires probable cause and a warrant, [*Almeida-Sanchez v. United States*, 413 U.S. 266 (1973)]; however the Border Patrol may, on the basis of reasonable suspicion, stop a vehicle and question its occupants to determine if illegal aliens are present. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). Mere questioning of persons seeking to enter the country at a permanent border checkpoint has been approved even in the absence of particularized suspicion that the vehicle contains illegal aliens. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

Similarly, with regard to fire-fighters, searches conducted pursuant to the lesser standard are limited in intensity and scope. *See Michigan v. Clifford*, ___ U.S. ___, 104 S.Ct. 641 (1984). If the fire-fighters want to conduct a full search for evidence of arson, they must obtain a warrant based upon probable cause. *Id.*, 104 S.Ct. at 647. However, if the search is

intended merely to ascertain the cause of a blaze, the fire-fighters need only show that a fire of unknown origin has occurred to obtain an administrative warrant; however, they must also show that "the scope of the proposed search is reasonable and will not intrude unnecessarily on the fire victim's privacy." *Id.*

Thus, in ruling that as the intensity of the intrusion increases, the definition of "reasonableness" in the schoolhouse setting approaches that of probable cause, the New Jersey Supreme Court followed long accepted principles of Fourth Amendment law.

C. A Student's Legitimate Expectation Of Privacy In The School Context Is Substantial.

Petitioner at the outset appears to endorse the standard adopted below as a "workable" one, taking issue only with the state court's assessment of the facts surrounding the search of T.L.O. See Supplemental Brief of Petitioner at 7-8. Later, however, petitioner asserts that because of the nature of the school environment, a student has at most a "minimal" expectation of privacy in school, [Supplemental Brief of Petitioner at 21]; thus virtually any search of a student would be *per se* reasonable. This construction would completely undermine the constitutionally mandated protections incorporated into the reasonable ground test. It would leave students with only slightly more protection of their Fourth Amendment rights than is now accorded to prison inmates whom this Court recently ruled had no expectation of privacy in their cells.⁵ See *Hudson v. Palmer*, ____ U.S. ____, 52 U.S.L.W. 5052 (July 3,

⁵ The salient factual differences between a public school and a prison are, or ought to be, too obvious to petitioner to need distinguishing here. See *Ingraham v. Wright*, 430 U.S. 651, 670-71 (1977). Moreover, respondent agrees with the Solicitor General's conclusion that any analogy drawn between the teacher/student relationship and the parole officer/parolee relationship is, at best, "imperfect." See *Amicus Curiae* Brief of Solicitor General at 24.

1984). Such an interpretation finds no support in either fact or law.

Application of the Fourth Amendment depends upon whether the person invoking its protection can claim that a reasonable or legitimate expectation of privacy has been invaded by government action. *Smith v. Maryland*, 422 U.S. 735, 741 (1979); *Katz v. United States*, *supra* at 353. To be deemed "legitimate," the expectation must not merely be subjective, but must also be one that society is prepared to recognize as reasonable. *Id.*

Last term, this Court, albeit in a very different context, detailed the analysis to be followed in determining whether an individual's expectation of privacy is reasonable. *Hudson v. Palmer*, *supra*, presented the issue of whether a prison inmate has any legitimate expectation of privacy in his cell. This Court noted that resolution of the question "necessarily entails a balancing of interests." *Id.* at 5054. The interests identified as pertinent were that of society in the security of its penal institutions and that of the prisoner in privacy within his cell. *Id.*

Weighed heavily in this balance was the recognition that a right to privacy is incompatible with the purposes and operations of penal institutions. *Id.* at 5055. It was noted that imprisonment has historically carried with it the circumscription or loss of many significant rights, and that, indeed, these restrictions serve the purposes of deterrence and retribution in our system of justice. *Id.* at 5054. It was also emphasized that the task of involuntarily confining persons who have already demonstrated a proclivity for anti-social or violent conduct, and of protecting the safety of the inmates, the correctional staff, visitors, and the community at large cannot be carried out if the prisoner is accorded any expectation of privacy in his cell. *Id.* at 5054-55.

Applying this analytical framework to the public school context, it is clear that students legitimately retain a substantial expectation of privacy in their persons and their effects. The

Fourth Amendment "reflects the recognition of the Founders that certain enclaves should be free from arbitrary government interference." *Oliver v. United States*, ___ U.S. ___, 52 U.S.L.W. 4425 (April 17, 1984). However, a person who enters a place defined to be "public" for Fourth Amendment analysis "does not lose all claims to privacy or personal security." *Id.* at 4428, n.10, citing to *Arkansas v. Sanders*, 442 U.S. 753, 766-67 (1979) (Burger, C.J., concurring). See also *Marshall v. Barlow's Inc.*, 436 U.S. 307, 311 (1978). Consequently, the mere fact that schools are by their very nature public places does not support the proposition that a student's expectation of privacy in the school context is minimal.

Certainly, a substantial expectation of privacy is not incompatible with the educational goals and purposes of the public school system. As this Court has itself stated,

That [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

West Virginia Board of Education v. Barnette, 319 U.S. 624, 637 (1943).

See also *Ambach v. Norwick*, *supra* at 76-77; *Horton v. Goose Creek Ind. School Dist.*, *supra* at 481.

This view has been echoed by educators. Law-Related Education⁶ is a curriculum reform that has been adopted by many school districts, and "has demonstrated promise in preventing delinquency by fostering social responsibility . . ." National

⁶ The National Office of Education in 1979 defined Law-Related Education as "organized learning experiences that provide students and educators with opportunities to develop the knowledge and understanding . . . to respond effectively to the law and legal issues in our complex and changing society." National School Boards Association, *Toward Better and Safer Schools*, 32 (1984).

School Boards Association, *Toward Better and Safer Schools*, 32 (1984) (hereinafter, *Toward Better and Safer Schools*). It has been endorsed by the National School Boards Association as an effective strategy in creating safer and better schools. *Id.* at 93-94. Significantly, schools implementing such programs have been advised that:

An important consideration, however, is that schools must practice what they teach. It would be difficult, and could cause more harm than good, to teach constitutional principles of due process and freedom of expression in schools with rigid, authoritarian, and repressive rule-making and enforcement structures. By integrating Law-Related Education into the educational process, schools can enable youth to become contributing members of their schools and their communities.

Id. at 33.

Thus, rather than conflicting with the educational goals of the public school system, conscientious protection of the Fourth Amendment rights and expectations of students affirmatively assists in attaining those goals.

Petitioner has cited to no case, nor has respondent's research disclosed any in which a lower court has held that a student's expectation of privacy in this person or effects is either minimal or non-existent in the school setting. Indeed, as previously discussed, [See Note 4, *infra*], the majority of courts, after conducting a balancing analysis akin to that in *Hudson v. Palmer*, *supra*, have concluded as did the Supreme Court of New Jersey, that the goals and operational concerns of our public educational facilities are not incompatible with respect for the personal integrity of the students, and can be accommodated by eliminating the requirement of a warrant and permitting the search to be conducted on the basis of the lesser, reasonable grounds standard. No further reduction in the student's expectation of privacy in his person has been deemed necessary.⁷ See e.g. *Horton v. Goose Creek Ind. School*

⁷ Petitioner seeks to even further diminish the minimal expectation of privacy it accords to a student's person, by stating that when a

Dist., *supra* at 478; *Doe v. Renfrew*, *supra* at 1023; *People v. Scott D.*, *supra* at 407.

Furthermore, petitioner cites no empirical evidence to support its position that an appropriate educational environment cannot be maintained and schools cannot be safely operated by school authorities unless students are stripped of virtually all expectation of privacy. Statistics have been cited in various of the *amicus curiae* briefs submitted in this matter to establish that problems with crime and discipline exist in the schools.

student brings "unnecessary" objects into school he/she has waived all expectation of privacy in them. Supplemental Brief of Petitioner at 23. While conceding that clothes are necessary items, petitioner concludes that a purse is not. *Id.* How petitioner arrives at this conclusion is puzzling to say the least. A purse is typically used to carry such things as money, eyeglasses, handkerchiefs, pens and pencils, keys, items for personal hygiene — all universally recognized as indispensable for day to day life, not to mention school. In any event, petitioner has supplied no precedential support for the proposition that an expectation of privacy is reasonable only when the article at issue is necessary to the activity engaged in.

Without a doubt, in view of the personal nature of the items typically carried in a purse, a subjective expectation of privacy exists. Moreover, this expectation is clearly one society is prepared to recognize as reasonable. Courts have held that a purse when carried by its owner, as compared with a situation where it is left unattended, is the functional equivalent of a pocket and is, in fact, "worn" just as pockets which are part of other items of clothing. See e.g., *United States v. Teller*, 397 F.2d 494 (7th cir. 1968); *United States v. Johnson*, 475 F.2d 977 (D.C. Cir. 1973); *United States v. Riccitelli*, 259 F.Supp. 665 (D. Conn. 1966). A purse is "an extension of the person, its form being only a matter of expediency, custom and style development over the centuries." *United States v. Teller*, *supra* at 496. Thus, under these circumstances, a search of a purse has been considered to be a personal search rather than the search of an object, and accorded the high degree of protection traditionally accorded to the human body in Fourth Amendment law. *Id.*; *United States v. Johnson*, *supra*; *United States v. Riccitelli*, *supra*. Surely a student's expectation of privacy in a purse is a legitimate one.

These statistics do not, however, support petitioner's conclusions.⁸

At the outset, it must be emphasized that while studies done at the local and national levels have revealed that problems with school crime exist and must be addressed, the findings suggest that the school system is "not the hotbed of crime and violence" that petitioner, implies.⁹ See ERIC Clearinghouse on Educational Management/National School Boards Association, *Research Action Brief*, 2-3 (1982), ERIC # Ed-208-453 (hereinafter, *Research Action Brief*). A number of surveys have concluded that the incidence of crimes committed in schools by students has been declining since the mid-1970's. National Institute of Education (D.H.E.W.), *Violent Schools — Safe Schools: The Safe School Study Report to the Congress*, 2 (1978), ERIC #ED-175-112 (hereinafter *The Safe School Report*); L.E.A.A. National Institute of Law Enforcement and Criminal Justice, *School Crime: The Problem and Some Attempted Solutions*, 3-4 (1980), ERIC #Ed-180 103

⁸ Significantly, while the Solicitor General suggests that the public school system is, in general, experiencing serious crime problems, he does not suggest a diminution of student's rights beyond the elimination of the warrant requirement and a substitution of the lesser standard of reasonableness for probable cause. See *Amicus Curiae Brief of Solicitor General*, generally and at 24-25.

⁹ Petitioner cites to *Gallup Education Surveys* which report that over the past fifteen years, the public has ranked discipline as the most serious problem faced by schools. Supplemental Brief of Petitioner at 19, n. 10. Such "public opinion" polls must, however, be viewed with extreme caution and cannot be relied upon as evidence of the present state of affairs in most schools. A recent, two-year study conducted by the Ford Foundation of 300 high schools in fifty-seven cities found significant improvements in learning climates, discipline, and in academic achievement. *Toward Better and Safer Schools* at 7. According to the National School Boards Association, this "study affirms the view of many educators that public perceptions sometimes lag significantly behind new realities." *Id.*

(hereinafter, *School Crime*); New Jersey Department of Education, *Final Report on the Statewide Assessment of Incidents of Violence, Vandalism and Drug Abuse in the Public School*, 57 (1982) (hereinafter, *New Jersey Final Report*); *Research Action Brief*, at 2-3.¹⁰ With regard to drug abuse, a recent study prepared for the National Institute on Drug Abuse by the University of Michigan's Institute for Social Research concluded that "the 1980's represent a period of leveling and decline in drug use" among high school students. *New York Times*, Feb. 7, 1984 at C9, col. 2 (city ed.).

The Safe School Study concluded that only 8% of the nation's school were experiencing a serious crime problem. *The Safe School Report* at 2. Some researchers feel that 4% is a more accurate estimate. *Research Action Brief* at 3. It would indeed be irrational to strip the vast majority of students of all but a minimal expectation of privacy, in order to attempt to solve the problems of a relative few.

In addition, there does not appear to be any reason to believe that the rate of crime is related to the ability of school personnel to conduct searches. For example, the Safe School Study identified a number of factors consistently found in schools with a high incidence of violence: High crime rate in the school's attendance area; higher proportion of male than female students attending; junior high school age level; large school population; lack of firmness in enforcing school rules; large class

¹⁰ In evaluating the findings of the reports cited herein it should be noted that they also include statistics on categories of crimes, such as vandalism, fighting, assault and arson, with which the use of a search is not normally associated. For example, the *New Jersey Final Report* indicates that between July of 1979 and June of 1981, the state's school districts reported 15,036 incidents of vandalism, 3,975 incidents of violence, and 2,212 incidents of drug abuse. *Id.* at 4. It would appear obvious that the most serious problem faced by the New Jersey schools over this period was vandalism, by an overwhelming margin. The utility of student searches to cope with this type of crime is doubtful.

size; lack of relevance of academic courses to students; students' feelings that they have little control over what happens to them. *The Safe School Report* at 8. As to property crimes, the study isolated these factors: High crime rate in the attendance area; high residential concentration near school premises; presence of non-student youth around school premises; unstable family conditions; large school size; lax rule enforcement; lack of coordination between faculty and administration; hostile and authoritarian attitudes on the part of teachers toward students; low student identification with teachers as role models; manipulation of grades as a disciplinary measure; intense competition for grades; intense competition for student leadership positions. *Id.* Many of these same problem areas have been identified by other studies. See e.g. Governor's (Mich.) Task Force, *School Violence and Vandalism Report* (1979), ERIC #Ed-191-946 (hereinafter *Michigan Report*); *New Jersey Final Report* at 57; California State Department of Education, *Preliminary Report on Crime and Violence in the Public Schools* (1981), ERIC #ED-208-567; New Jersey School Boards Association, *School Violence Survey* (1977), cited in *Research Action Brief* at 3; *Toward Better and Safer Schools* at 3-13.

None of these studies found the infrequency of student searches to be a significant factor in schools with a serious crime problem. Moreover, of the many remedial measures proposed by these studies to reduce the existing crime rate, none involved increasing the intensity of student searches. On the contrary, the findings would seem to suggest that several of the conditions which are associated with a high crime rate could actually be exacerbated by an increase in the number of searches conducted, and by the failure to prevent unreasonable searches of students.

The Safe School Study concluded that the incidence of crime is high in schools where "students feel they have little control over what happens to them," and where there are "authoritarian attitudes on the part of teachers toward students." *The Safe School Report* at 8. See also *The Michigan Report* at 10. It

was found that "fairness in the administration of discipline and respect for students is a key element in the effective governance of schools," and that "close personal ties between teachers and students" lower the risks of criminal conduct. *The Safe School Report* at 9. See also Clark, *Violence in Public Schools: The Problem and Its Solutions*, 8 (1978), ERIC #ED-151-990; *Toward Better and Safer Schools* at 4-5, 33. Frequent searches of students, particularly where no reasonable basis exists justify the search, will not engender respect¹¹ between educators and students, and will only increase the students' perception that they have no control over what happens to them.¹²

Furthermore, while petitioner repeatedly emphasizes the duty of educators to protect the children in their charge from the dangers of criminal conduct on the part of their fellow students, petitioner nowhere addresses the responsibility of school personnel to prevent the harm to students attendant

¹¹ The Solicitor General recognizes that "educators must strive to create an atmosphere of trust and friendship between students and school officials," but suggests that the imposition of the "formalities of the criminal law process" can only be disruptive of this ideal. Brief of *Amicus Curiae* at 24. Respondent would suggest that the emotional relationship between student and teacher is far more likely to be destroyed by the specter of teachers invading the personal belongings and/or the bodily integrity of their students. The "formalities" of the Fourth Amendment may, in fact, promote a relationship of teacher-pupil trust by reassuring the students that no search will be conducted unless there is a reasonable ground to believe that it is necessary, and that the scope of the intrusion will be appropriately circumscribed.

¹² In the context of juvenile court proceedings, this Court long ago accepted the psychological evidence that "the appearance as well as the actuality of fairness, impartiality and orderliness . . . may be a more impressive and more therapeutic attitude so far as the juvenile is concerned." *In re Gault*, 387 U.S. 1, 26 (1967). the absence of established procedures may give the child a sense that he is being arbitrarily dealt with by all-powerful adults and he may, as a result, resist the rehabilitative efforts that follow. *Id.*

upon arbitrary and unreasonable searches. With regard to adults, this Court has described the relatively limited measure of a "pat-down" search as "an annoying, frightening and perhaps humiliating experience," [*Terry v. Ohio*, *supra* at 24], and "a serious intrusion upon the sanctity of the person which may inflict great indignity and arouse strong resentment." *Id.* at 17, n.15. The embarrassment suffered by shy adolescents whose personal possessions have been exposed to public view or whose clothing has been rifled, the humiliation experienced by students required to disrobe or to submit to the indignity of a school administrator touching intimate parts of their bodies, this harm, too, must be considered in any balancing of interests.¹³

Some courts have recognized that because of their tender age and emotional immaturity, children are more likely than adults to suffer psychological damage when subjected to involuntary searches. See *Horton v. Goose Creek Ind. School Dist.*, *supra* at 478-79; *People v. Scott D.*, *supra*, 34 N.Y.2d at 490; *Bellnier v. Lund*, *supra* at 53. As one commentator warned:

This possibility of harm is even more ominous since the innocent as well as the guilty suffer from unreasonable searches. One example of this is the case in which an entire fifth grade class was strip searched after one student told the teacher three dollars were missing from a coat pocket [See *Bellnier v. Lund*, *supra*]. The indignity and trauma created by the search was fruitless; no money was found.

The Torturable Class at 731.

¹³ These are not merely hypothetical concerns. Reported decisions have revealed school searches which have constituted extreme invasions of personal privacy. See e.g. *Bellnier v. Lund*, *supra*, (in which an entire class of fifth graders was strip-searched); *M.M. v. Anker*, *supra*, 477 F. Supp. at 837, and *Doe v. Renfrew*, *supra*, 631 F.2d at 91 (both involving the strip searches of individual students); *Stern v. New Haven Conn. Schools*, 529 F. Supp. 31 (E.D. Conn. 1981) (in which a "two-way" mirror was installed in a boys' rest room).

The physical safety of students is, of course, of great concern to school personnel, but educators have a parallel responsibility to safeguard the emotional well-being of the children in their charge. For some time, educators have been aware that a closed authoritarian environment in the classroom is destructive to the emotional health of students. The destructive effects which this type of atmosphere can have upon students is so devastating that educators have referred to the phenomena as "soul murder." *Toward Better and Safer Schools* at 27.

In light of these considerations respondent would urge this Court not only to affirm the reasonable grounds standard endorsed by the court below, but to recognize that students have a substantial expectation of privacy in the school context.

D. The Supreme Court Of New Jersey Correctly Held That The Search Of T.L.O. Violated Her Fourth Amendment Rights.

1. The Assistant Principal Had No Reasonable Grounds To Open The Juvenile's Purse.

Applying the reasonable grounds standard to the incident at issue, the Supreme Court of New Jersey found that the Assistant Principal did not have reasonable grounds to open the juvenile's purse, and that the search was, therefore, unconstitutional. *State in the Interest of T.L.O.*, *supra* at 942. A review of the facts below compels this conclusion.

Ms. Chen, a member of the faculty, testified that when she entered the girls' restroom, she observed T.L.O. and another juvenile smoking tobacco cigarettes. (TS 20-7 to 5) Since the restroom was not one of the school's specially designated smoking areas, the girls' conduct constituted a violation of school rules. Ms. Chen escorted the juveniles to the office of Assistant Principal Choplik, and advised him of the infraction. (TS 22-21 to 23) When Mr. Choplik confronted T.L.O. with the charge, she denied that she smoked at all. (TS 27-1 to 21)

Although Mr. Choplik acknowledged that no further evidence was necessary to impose a sanction for violating the

smoking rules, he nevertheless proceeded to open T.L.O.'s purse.¹⁴ (TS 47-9 to 13) He did so ostensibly in an effort to be fair to the juvenile and to investigate the situation before imposing punishment. (TS 30-24 to TS 31-3).

Utilizing the criteria set forth below, it is clear that under these circumstances, the principal's opening of the purse was unreasonable. Certainly no evidence was presented that "the prevalence and seriousness of the problem in the school to which the search was directed" [*State in the Interest of T.L.O.*, *supra* at 942] warranted the search. In a school in which smoking was allowed in designated areas, the possession of cigarettes not only presented no problem, but was completely in accordance with school regulations. As to the infraction of smoking in a rest room, no testimony was adduced to show that such occurrences had presented a serious problem to the school authorities in maintaining an environment conducive to education.

Surely not every violation of school rules, in itself, justifies the search of a student.¹⁵ It would be ludicrous to suggest that a

¹⁴ The Solicitor General asserts that in the face of the juvenile's denial, if the vice principal had proceeded to impose punishment without any further investigation, T.L.O. would have learned the unfortunate lesson "that students are always to be disbelieved." Brief of Solicitor General at 27. The seizure and search of her purse, however, could hardly have been understood by T.L.O. as a sign of the principal's faith in her honesty. Respondent did not intend, at oral argument to imply that the immediate imposition of punishment was the best course of action for the principal to pursue, only that it was preferable to subjecting a student to a search. Respondent would suggest that if Mr. Choplik genuinely believed that Ms. Chen could have been mistaken, and wanted to pursue the matter further in an attempt to support the student's credibility, he could have easily questioned the other girls who were present in the rest room with T.L.O. One of those girls was already in the vice principal's office and could have simply been asked whether T.L.O. had been smoking.

¹⁵ The National School Boards Association recommends "sensitivity and balance" in dealing with disciplinary problems. *Towards*

teacher could reasonably search a student to ascertain if he possessed a packet of bubble gum, even though possession of this innocuous item might be proscribed by school rules. The "threat" to school safety and order presented by this infraction would hardly warrant the extreme measure of a personal search. Similarly, in the instant matter, the infraction was not one which involved weapons, drugs, or other dangerous substances; therefore the level of seriousness was not such that a search was reasonably required. Compare *State v. McKinnon*, *supra* (upholding as reasonable the search of a student where principal received information that student possessed narcotics in particular pockets of specifically described clothing and was selling it to other students); *Bahr v. Jenkins*, 539 F. Supp. 483 (D.C. Ky. 1982) (search of student's purse found to be reasonable when principal informed that she possessed and was distributing firecrackers that were being set-off in the school building); *Interest of L.L.*, *supra* (reasonable for teacher to search student's pocket when his conduct and information from other students indicated that he possessed a knife or razor blade).

As to "the exigency to make the search without delay," [*Id.*], for similar reasons, this criteria has no application to the facts at issue here. The principal had no information that the student was in possession of weapons, narcotics, or other items which presented an immediate threat to the safety of other students or to the orderly school environment.

The trial court assumed that smoking in a prohibited area would constitute a threat to the fire safety of the building. *State in the Interest of T.L.O.*, 178 N.J. Super. 329, 428 A.2d 1327 (J.D.R.C. 1980). However, no evidence was presented to this

Better and Safer Schools at 3. It also warns against treating minor infractions with the same methods as would be appropriate when dealing with violence or serious crime: "[E]quating disciplinary issues solely with the incidence of crime and violence will do little to solve the problem. It may actually foster policies that further alienate students." *Id.*

effect. If this incident had occurred in an elementary school, a threat to fire safety might be deduced from the age of the students and their inexperience with, or inability to handle matches. At the high school level, the ability of students of that age to safely manage matches or lighters is scarcely open to question. The school authorities involved in this case had, themselves, recognized this fact by permitting students to smoke in the school. Thus the criteria of "the child's age" [*State in the Interest of T.L.O.*, 463 A. 2d at 942] lends no support to the actions of the vice principal.

No testimony was adduced as to the student's "history, and school record" [*Id.*] from which it could be concluded that she presented a threat to the safety of the school. She had no record of prior smoking violations or disciplinary infractions of any kind. Compare, e.g. *Interest of L.L.*, *supra*, (in which one factor upon which the court upheld a teacher's search of a student for a weapon was the fact that the student had a past history of carrying weapons and was in a special class for emotionally disturbed students).

Finally, "the probative value of and the reliability of the information used as a justification," [*State in the Interest of T.L.O.*, *supra*] was correctly assessed by the New Jersey Court as having no relationship to the search carried out. *Id.* Since the school allowed smoking in designated areas, carrying cigarettes did not violate school regulations. Thus, the package of Marlboros did not amount to contraband subject to confiscation. Concededly, the eyewitness report of Ms. Chen gave the vice principal a reasonable basis to believe that T.L.O. was smoking in the girl's rest room. It supplied no grounds to believe that the student's purse contained cigarettes, even if some valid reason could be hypothesized for their seizure:

No one furnished information to that effect to the school official. He had, at best, a good hunch. No doubt good hunches would unearth much more evidence of crime on the part of students and citizens as a whole. But more is required to sustain a search.

Id. at 942-43.

Even under a lesser, reasonable grounds test, the agent conducting the search cannot rely upon inchoate suspicions, but "must be able to point to specific and articulable facts" and the "rational inferences" which may be drawn from those facts. *Terry v. Ohio*, *supra* at 21, 27. See *Bellnier v. Lund*, *supra* at 53; *Interest of L.L.*, *supra* at 351; *People v. Scott D*, *supra* at 408-09.

Petitioner suggests that the principal's conduct was reasonable because the juvenile denied that she smoked, the possession of cigarettes would show that she lied in this regard, and the fact that she lied about being a smoker would demonstrate that she was lying when she said she was not smoking in the rest room. Certainly the Fourth Amendment does not limit government action to searches for contraband; a search can be lawfully made for evidential items which would aid in apprehending and convicting law-breakers. *Warden v. Hayden*, 387 U.S. 294, 307 (1967). However, in this type of search there must be a nexus between the item to be seized and the criminal behavior:

Thus in the case of "mere evidence," probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. *Id.*

In the instant matter, there is no such nexus.

The presence or absence of cigarettes in the juvenile's purse would have provided no proof of either innocence or guilt as to the infraction of smoking in the rest room. Failure to find them would not have cleared T.L.O. of the charge of smoking in a prohibited area; she could have been smoking a cigarette borrowed from or shared with another student. Indeed, the principal was aware that T.L.O. had been in the girls' room with another student who candidly admitted that she had been smoking and was therefore as likely a source of the cigarettes as T.L.O.'s purse.

Conversely, the presence of the cigarettes would not have been probative of guilt. Since the school rules allowed students

to smoke in designated zones, there were undoubtedly many students in school that day who possessed cigarettes, but did not violate the rules by smoking in prohibited areas. Mere possession would not have even showed that T.L.O. lied when she said she did not smoke at all; she could have been carrying a packet belonging to a friend. Thus, the objective of the principal's search, the package of cigarettes, lacked the requisite evidential nexus with the infraction committed by the student.

Moreover, as previously noted, even if Mr. Choplik had had some valid evidential objective in mind when he initiated the search, he had no information whatsoever upon which to conclude that such evidence was contained in her purse. *State in the Interest of T.L.O.*, *supra* at 942-43. Ms. Chen told Mr. Choplik that she had observed the juvenile smoking; she did not tell him that she had seen T.L.O. taking cigarettes from or putting them into her purse.

Under these circumstances and after consideration of the relevant criteria, it is clear that the New Jersey Supreme Court correctly concluded that the vice principal did not have reasonable grounds to conduct a search. Moreover, as the court below held, as the intrusiveness of the search intensifies, the standard of "reasonableness" approaches probable cause. *State in the Interest of T.L.O.*, *supra* at 942. Opening a closed purse carried by a student is a significant intrusion into an area in which, as was previously stated, individuals are recognized to have a high expectation of privacy. In view of the nature of the intrusion, the facts upon which the school official based his actions did not amount to reasonable grounds.

2. Assuming *Arguendo* That The Vice-Principal Had Reasonable Grounds To Open T.L.O.'s Purse, The Resulting Search Exceeded The Constitutionally Permissible Scope.

Once Mr. Choplik opened T.L.O.'s purse, he observed "a package of Marlboros sitting right on top there." (TS 28-3 to 11) He removed the package of Marlboros, and as he did so, he observed cigarette rolling papers in the purse. He then pro-

ceeded to search the entire purse finding a metal pipe; some empty plastic bags; one plastic bag containing tobacco or some similar substance¹⁶; a wallet containing "a lot of singles and change"; and inside a separate compartment, two letters and an index card. (TS 29-10 to 16; TS 3-7 to 10; TS 38-6 to 12; TS 40-20 to 22; TS 39-4 to TS 40-11)

Assuming, *arguendo*, that the assistant principal had some valid basis for opening the juvenile's purse to see if she possessed cigarettes, the subsequent search far exceeded the scope constitutionally permissible under the circumstances. It is well-settled that "a search which is reasonable in its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Terry v. Ohio*, *supra* at 17-18. *Kremen v. United States*, 353 U.S. 346, 347 (1957). The scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible. *Terry v. Ohio*, *supra* at 19; *Warden v. Hayden*, *supra*. Once he opened the purse and saw the package of Marlboros, which he acknowledged were "right on the top," (TS 28-3 to 11), Mr. Choplik had no basis to search any further. Since the cigarettes were not contraband, *i.e.*, possession of them did not violate any law or any school rule, he had no right to seize them. Whatever evidential purposes it could be said that that possession of the packet may have had were fully served by Mr. Choplik's immediate observation.

Petitioner nevertheless maintains once the vice-principal removed the Marlboro packet, the cigarette rolling papers came into plain view, and thereby supplied him with a valid basis to suspect the presence of drugs and to search for them. Application of the plain view doctrine presupposes that the initial intrusion as a result of which the incriminating evidence was inadvertently discovered was in itself lawful. *Coolidge v. New Hampshire*, 403 U.S. 443, 466-67 (1971). Since the vice-

¹⁶ At trial, it was stipulated that the bag contained 5.40 grams of marijuana. (T 12-17 to 25)

principal had no valid basis to seize the Marlboro packet, the subsequent exposure of the rolling papers did not come within the plain view exception.

Even if the plain view doctrine could, on the basis of the principal's observation of the rolling papers, be said to have validated the search for and seizure of the 5.40 grams of marijuana, the pipe, and the rolling papers which were found in the purse, it clearly could not have justified the seizure of the student's letters which were taken from a separately zippered compartment. Information that a student possesses narcotics paraphernalia may furnish a reasonable basis under the Fourth Amendment to search for drugs. However, the Fourth Amendment forbids "a general exploratory rummaging in a person's belongings" in the unparticularized hope of uncovering evidence of crime. *Coolidge v. New Hampshire*, *supra* at 468; *Stanley v. Georgia*, 394 U.S. 557, 572 (1969) (concurring opinion of Stewart, J.).

The principal had no information upon which to conclude that these letters had any evidential value with regard to the initial cigarette smoking violation or the subsequent finding of grams of marijuana. Moreover, since their relationship to the drug offense was not "immediately apparent" to the searcher [*Coolidge v. New Hampshire*, *supra* at 466-67], and "could not be determined by mere inspection" [*Stanley v. Georgia*, *supra*], they were not within the ambit of the plain view doctrine, and could not be lawfully seized. Compare *United States v. Ochs*, 595 F.2d 1247 (2nd Cir. 1979) (plain view found when officers conducting inventory search of impounded car found a number of ledger sheets marked "Studio I," which the officers from other investigations knew to be a brothel); *United States v. Pugh*, 566 F.2d 626 (8th Cir. 1977) (plain view found when an officer arresting a man for possession of cocaine, observed in a half-opened brief case, a book entitled "Cocaine Consumer's Handbook"); *Mapp v. Warden*, 531 F.2d 1167 (2nd Cir. 1976), *cert. den.* 429 U.S. 98 (1976) (finding plain view where the police had probable cause to believe that two apartments rented under false names were being utilized to manufacture

narcotics, and during the search of one apartment for drugs found rent receipts for the other); *United States v. Berenguer*, 562 F.2d 206 (2nd Cir. 1977) (finding that the plain view exception did not apply to a wallet containing bills of large denomination when police, while arresting a man for drug distribution, seized the wallet from his nightstand). Thus, the plain view doctrine cannot be validly used to justify the portion of the search which extended into the juvenile's personal papers.

It is true that children cannot be equated with adults for all constitutional purposes.

At the same time, in a civilized society it is also recognized that the obligations and powers of those charged with the care of children should be limited by standards shaped by the conditions which require them. Thus, the imposition of authority over children may not exceed the causes which give rise to that authority.

People v. Scott D., *supra* at 407. While it is clear that under certain circumstances, searches of students by school officials are constitutionally permissible, it is equally clear that unless the scope of those searches is carefully circumscribed, the Fourth Amendment protections accorded to students will be rendered meaningless. In the instant matter, the search of T.L.O. extended far beyond the substantiation of the smoking infraction which petitioner claims gave the assistant principal sufficient grounds to look inside the purse. For this reason, respondent submits that even if the initial opening of her pocketbook was reasonable, the resulting search exceeded constitutionally permissible limits and the evidence obtained thereby was properly suppressed.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the decision of the Supreme Court of New Jersey be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF NEW JERSEY,

Petitioner,

—v.—

T.L.O., A Juvenile,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

**MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICI CURIAE*
FOR THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK,
JUVENILE RIGHTS DIVISION, AND ADVOCATES FOR CHILDREN
OF NEW YORK, INC. IN SUPPORT OF RESPONDENT**

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No. 83-712

IN THE
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STATE OF NEW JERSEY,

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T.L.O., A Juvenile,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

MOTION FOR LEAVE TO FILE
A BRIEF AMICI CURIAE

The Legal Aid Society of the City of New York and Advocates For Children of New York, Inc., move this Court for leave to file a brief amici curiae in support of respondent in the above case.

Consent to file an amici curiae brief was obtained in writing from Lois DeJulio, First Assistant Deputy Public Defender, State of New Jersey, counsel

2. I submit this affidavit in support of a motion by The Legal Aid Society of the City of New York and Advocates For Children of New York, Inc., for an order granting leave to file an amici curiae brief in support of respondent.

3. On behalf of The Legal Aid Society and Advocates For Children, I requested consent of the parties to submit an amici curiae brief in this Court. On August 1, 1984, I spoke with counsel for respondent, Lois DeJulio, First Assistant Deputy Public Defender of New Jersey. Ms. DeJulio orally consented and, in a letter dated August 6, 1984, transmitted written consent.

4. On August 9, 1984, I spoke with counsel for petitioner, Allan Nodes, Deputy Attorney General of New Jersey. I requested consent to submit an amici curiae brief in this Court. Mr. Nodes

informed me that he could not consent and that I should submit a written request. I was advised, however, that consent would probably not be granted and a motion would be necessary. On August 9, 1984, I transmitted a letter to Mr. Nodes formally seeking consent to the submission of an amici curiae brief. As of this date, I have not received a response to that request.

5. The Legal Aid Society, Juvenile Rights Division, and Advocates For Children of New York, Inc., bring a unique perspective to bear on this case by virtue of their substantial experience in representing children in school-related matters:

a. The Legal Aid Society is a private, non-profit legal assistance agency, which since 1876, has sought to provide quality legal representation to persons living in New York City who can-

not afford to pay a private lawyer. The Juvenile Rights Division of The Legal Aid Society, has been in existence since 1962, and is the single largest organization representing children in the United States. In addition to traditional courtroom representation of juveniles, the Division has provided representation to numerous juveniles in public school disciplinary proceedings.

b. Advocates for Children of New York, Inc. (AFC) is a fifteen year old voluntary, non-profit children's rights project. AFC's activities have focused on securing and defending the educational rights of New York City public school students through representation in individual and class actions and participation in legislative hearings and other public advocacy activities.

6. Amici request permission to submit this brief because of their con-

cern about the impact of this case on their clients, on the educational system and on the administration of justice in juvenile and adult courts. The central issue presented in this case - whether a public school student's constitutional rights were violated when a public school official searched her purse - is obviously of great importance to the thousands of students represented by amici. Amici wish to provide this Court with an analysis of the legal issues and, based upon their extensive experience in school related matters, the implications of a decision by this Court.

WHEREFORE, for the reasons stated above, The Legal Aid Society, Juvenile Rights Division, and Advocates For Children of New York, Inc. respectfully request permission to submit a brief amici curiae in support of respondent in this case.

Henry S. Weintraub
HENRY S. WEINTRAUB

Sworn to before me this
21st day of August, 1984

Jane M. Griffin
Notary Public

JANE M. GRIFFIN
Notary Public, State of New York
No. 4616922
Qualified in K
Commission Expires 8/30/1985

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No. 83-712

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

STATE OF NEW JERSEY,

Petitioner,

v.

T.L.O., A Juvenile,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

AMICI CURIAE BRIEF FOR THE
LEGAL AID SOCIETY OF THE
CITY OF NEW YORK, JUVENILE RIGHTS
DIVISION, AND ADVOCATES FOR
CHILDREN OF NEW YORK, INC.

INTEREST OF AMICI CURIAE

The Legal Aid Society is a private, non-profit legal assistance agency, which since 1876, has sought to provide quality legal representation to persons living in New York City who cannot afford to pay a private lawyer. The Soci-

ety has a full-time staff in excess of 600 attorneys, who provide assistance to more than 200,000 people a year in all trial courts in New York City, in the state and federal appellate courts and in this Court.

Amicus curiae, the Juvenile Rights Division of The Legal Aid Society, has been in existence since 1962, when the New York State Legislature enacted the Family Court Act and mandated the assignment of counsel in juvenile proceedings. The Juvenile Rights Division is the single largest organization representing children in the United States. At present, it comprises 78 trial, appellate and special litigation attorneys and a social services support staff of 38, including four full-time educational consultants, whose primary responsibility is the representation of juveniles who are the subject of Family Court pro-

ceedings in New York City. In 1983, the Juvenile Rights Division lawyers (referred to by state statute as "law guardians") were assigned as counsel in approximately 17,000 proceedings, including cases involving juvenile delinquency, status offenses, and child abuse and neglect. The Division's Special Litigation Unit also initiated actions including, inter alia, actions to effectuate the educational rights of its clients. In addition, the Division provides representation to numerous juveniles in public school disciplinary proceedings. These administrative proceedings, as well as the delinquency cases, have raised questions at times about the legality of searches of public school students.

Advocates For Children of New York, Inc. (AFC) is a fifteen-year-old voluntary, non-profit, children's rights or-

ganization. AFC's activities have focused on securing and defending the educational rights of New York City public school students through representation in individual and class actions, presentation of testimony in public hearings and other advocacy activities. AFC handles approximately 1,300 individual students' cases annually, providing assistance to suspended students, school crime victims, students with handicapping conditions, students at risk of becoming drop-outs, and students denied educational opportunity because of language barriers, sex and race discrimination, low achievement and adjustment problems. In a class action relevant to this case, AFC has served as co-counsel in Boe v. Board of Education, 80 Civ. 2829 (S.D.N.Y.), a suit challenging due process violations in school suspension hearings.

AFC currently serves on the New York State Board of Regents' Advisory Council and on numerous New York City Board of Education advisory councils and committees. As part of a nationwide effort by the National Coalition of Advocates for Students, AFC sponsored hearings on the state of public schools in New York State in May 1984. AFC has offered testimony at numerous legislative hearings at the city, state and federal levels on school discipline, quality of education, and the rights and needs of at-risk students.

Importantly, from 1981 through 1983, both amici served on the New York City Mayor's and School Chancellor's Joint Task Force on School Safety, participating in the formulation of final recommendations to improve safety and discipline practices in New York City public schools.

Amici are vitally concerned about the quality of education in this nation's public schools. At the same time, amici are extremely troubled by the prospect that public school students will be denied the valued safeguards vouchsafed by the Fourth Amendment to the United States Constitution. Amici are convinced that the legitimate interests of excellence in education and school safety can be satisfactorily achieved without a wholesale deprivation or substantial dilution of Fourth Amendment rights in the public school context.

The central issue presented in this case - whether a public school student's constitutional rights were violated when a public school official searched her purse - is obviously of great importance to the thousands of students represented by amici. Amici submit this brief because of their concerns about the impact

of this case on their student clients, on the educational system and on the administration of justice in juvenile and adult courts. Based upon their extensive experience in school-related matters, amici wish to provide this Court with a unique analysis of the legal issues and the implications of a decision by this Court in this matter.

QUESTION PRESENTED

Whether the assistant vice-principal violated the Fourth Amendment in opening respondent's purse in the facts and circumstances of this case.¹

SUMMARY OF ARGUMENT

This Court has consistently held that public school students have constitutional rights which are enforceable against the State. The State of New Jersey's involvement in its public school system is pervasive through its

¹Amici adopt the summary of facts in Brief of Respondent at 2-6.

statutory education scheme. Therefore, New Jersey public school officials act under the authority of the State and, as governmental agents, are subject to the Fourth Amendment in conducting searches of public school students.

The employment duty of public school officials to maintain a safe environment conducive to education leads to the conclusion that searches by them constitute governmental action. In the present case, the assistant vice principal searched T.L.O. as part of the disciplinary responsibilities of his position. Searches to enforce school regulations may lead to the discovery of violations of the criminal law. As in the present case, many jurisdictions impose a legal duty on public school officials to report such violations to the police, further emphasizing the governmental character of school searches.

The doctrine of in loco parentis is not consistent with the contemporary responsibilities of public school officials towards their students and cannot be applied to take searches of students by public school officials out of the ambit of the Fourth Amendment.

Public school students have a legitimate expectation of privacy in their person and in their belongings when they enter school. Society recognizes that public school students have substantial privacy interests and is not prepared to extinguish those interests at the schoolhouse gate. When balanced against the state's interest in maintaining an environment conducive to learning, the student's interest in being free from arbitrary and intrusive searches by public school officials is great. To hold that public school students have absolutely no expectation of privacy would

equate them to convicted incarcerated inmates.

Well-established constitutional principles as well as sound reasons of public policy compel a conclusion that searches of school children by public school officials be tested against the Fourth Amendment probable cause standard. Student searches frequently involve intrusive searches of the person and personal effects. To protect students from arbitrary invasions of privacy, public school officials should be required to abide by the traditional limitations the Constitution places on official conduct.

When public school students are secure from unreasonable searches that threaten their privacy, significant benefits inure to the overall education process. Strict adherence to constitutional principles is essential if school

children are to learn the concepts of fairness, justice and privacy upon which our Constitution was founded.

No exigent circumstances were present in the case at bar to justify relaxation of Fourth Amendment standards and the decision of the New Jersey Supreme Court that the search of T.L.O. was unreasonable must be affirmed.

ARGUMENT

POINT I

SEARCHES OF PUBLIC SCHOOL STUDENTS
BY PUBLIC SCHOOL OFFICIALS ARE
SUBJECT TO THE FOURTH AMENDMENT.

A. The Search by the Public School
Assistant Vice Principal Was Con-
ducted Under State Authority and
Therefore Constituted Governmental
Action Subject to the Fourth
Amendment.

Public school officials, as govern-
mental agents, are subject to the re-
straints of the Fourth Amendment. They
are employed by a governmental entity,
work in a public institution, are paid
with public funds and perform a govern-
mental function. In addition, their em-
ployment duties to maintain a safe and
orderly school environment for their
students, whose presence is compelled by
law, to investigate unlawful activity,
and to report unlawful activity to the
police epitomize the governmental, as
opposed to private, character of their
actions. There can be no question that

their actions are cloaked with the au-
thority of the state. Therefore,
searches of public school students by
public school officials fall under the
purview of the Fourth Amendment.

Public school students, like a-
dults, have constitutional rights which
are enforceable against governmental au-
thorities. Tinker v. Des Moines Inde-
pendent Community School District, 393
U.S. 503, 511 (1969) (First Amendment
freedom of speech). This Court has de-
clared that "[t]he Fourteenth Amendment,
as now applied to the States, protects
the citizen against the State itself and
all of its creatures -- Boards of Educa-
tion not excepted." West Virginia Board
of Education v. Barnette, 319 U.S. 624,
637 (1943) (First Amendment freedom of
religion). As Justice White noted in a
decision upholding the due process
rights of public school students: "The

authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards." Goss v. Lopez, 419 U.S. 565, 574 (1975).

The vast majority of federal and state courts which have considered the issue of whether the search of a public school student by a public school official constitutes state action have found governmental action within the scope of the Fourth Amendment. For an extensive compilation of cases see Brief of Respondent at 17, n. 5.²

Governmental officials as a class

²The Department of Justice, by not raising the issue in its brief in this matter, has essentially conceded that the search of a public school student by a public school official constitutes governmental action for Fourth Amendment purposes. See Brief for the United States as Amicus Curiae Supporting Reversal.

are bound by the constraints of the Fourth Amendment. Burdeau v. McDowell, 256 U.S. 465, 475 (1921); Michigan v. Tyler, 436 U.S. 499, 504-05 (1978). The "basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

New York's highest court has held that, "[i]n exercising their authority and performing their duties, public school teachers act not as private individuals but perforce as agents of the State." People v. Scott D., 34 N.Y.2d 483, 486, 358 N.Y.S.2d 403, 406, 315 N.E.2d 466, 468 (1974)³. In the pres-

³Petitioner misstated the law of New York State in relying upon a lower court

ent case, there is no question that the assistant vice principal, Mr. Choplik, searched the student, T.L.O., as part of his duties as an official of the Piscataway Public Schools. In describing his duties, the assistant vice principal stated: "[W]e're responsible for ... taking care of any kind of disciplinary problems" (TS 41-19 to 21).⁴ He stated that his "capacity" at "work" on the day of the search was "... in the office taking care of some discipline problems." (T 8-8 to 11). As this

(footnote continued)

opinion, People v. Stewart, 63 Misc.2d 601, 313 N.Y.S.2d 253 (Crim. Ct. 1970), which is no longer good authority in light of the New York Court of Appeals decision in People v. Scott D. See Supplemental Brief for Petitioner, at 13 n. 7.

⁴"TS" designates the transcript of the hearing on the Motion to Suppress held on September 26, 1980. "T" refers to the transcript of the trial conducted on March 23, 1981.

Court has held: "If an individual is possessed of state authority and purports to act under that authority, his action is state action." Griffin v. Maryland, 378 U.S. 130, 135 (1964).

The State of New York, which has been found to be "inextricably entwined in its various municipal school systems ...," Bellnier v. Lund, 438 F. Supp 47, 51 (N.D.N.Y. 1977), has a statutory education scheme comparable to that of New Jersey. In finding state action in the search of students by public school officials, the Bellnier District Court relied explicitly on New York statutes regarding compulsory education, teacher regulation, and most importantly, indemnification of school personnel for attorneys fees and expenses resulting from defending a legal action resulting from

an attempt to discipline a student.⁵

The interest asserted in this case by the State of New Jersey to justify the search of T.L.O., i.e., "to protect the health of respondent and her peers and to facilitate school discipline" (Supplemental Brief for Petitioner upon Reargument at 14), is one of the very bases utilized by courts to support the holding that public school officials' actions constitute governmental action subject to the Fourth Amendment. In finding teachers and administrators subject to the Fourth Amendment, a number

⁵N.Y. Education Law §§ 3202, 3205, 3210 (compulsory education); 3001-3020 (regulation); 3028 (indemnification) (McKinney 1981). Bellnier v. Lund, 438 F. Supp. 47, 51-52 (N.D.N.Y. 1977). Compare, e.g., N.J. Stat. Ann. §§ 18A:38-1 to -3, -25 to -27 (compulsory education); §§ 18A:6-7, -10, -38; 18A:26-1 to -10; 18A:27-2, -4 to -6; 18A:28-4 to -6, -8; 18A:29-4, -4.1; 18A:30-1 to -7 (regulation); §§ 18A:16-6, -6.1 (indemnification) (West 1968 & Supp. 1984).

of courts have stressed the employment duty of such public school officials to maintain a safe environment conducive to education. See, e.g., Horton v. Goose Creek Independent School District, 690 F.2d 470, 480 (5th Cir. 1982), cert. den., ___ U.S. ___, 103 S. Ct. 3536 (1983); People v. Jackson, 65 Misc.2d 909, 910, 319 N.Y.S.2d 731, 733 (App. Term 1971), aff'd, 30 N.Y.2d 734, 333 N.Y.S.2d 167, 284 N.E.2d 153 (1972). In New Jersey, among other states, teachers are statutorily required to hold pupils accountable for disorderly conduct. N.J. Stat. Ann. § 18A:25-2 (West Supp. 1984).

There is but a fine line between a public school official's responsibility to maintain order and safety and the actual enforcement of the criminal law. The New York Court of Appeals aptly noted that "searches for noncriminal pur-

poses often lead to evidence forming the basis for a criminal prosecution." People v. Scott D., 34 N.Y.2d at 487. Moreover, school officials have a duty to investigate unlawful activity. People v. Overton, 20 N.Y.2d 360, 363, 283 N.Y.S.2d 22, 25, 229 N.E.2d 596, 597 (1967); State v. Baccino, 282 A.2d 869, 871 (Del. Super. 1971).

It is common for school officials to be required by statute (See examples compiled in Brief of Respondent at 20 n. 9) or by school policy to report violations of the criminal law to the police. The employment duty to report to the police goes beyond that of a private citizen and so further emphasizes the governmental rather than private character of student searches by public school officials. In the present case, Mr. Choplik, the assistant vice principal, affirmed that he was obligated by the

policy of the Piscataway Board of Education to report "suspected offense[s] involving marijuana or narcotics" to the police, which he did in this matter. (TS 45-6 to 13).

Significantly, the chief counsel of the National Association of Secondary School Principals, in an official publication of the Association, urges: "Violations of law should always be reported to the community's law enforcement agents; if the district has no regulation requiring principals to do so, it would be sensible to get one adopted." R. Ackerly, The Reasonable Exercise of Authority 19 (1969).

Both Advocates For Children and The Legal Aid Society regularly represent students who have been arrested on the basis of reports to the New York City Police Department by public school officials. The New York City Board of Edu-

cation has adopted a regulation mandating the summoning of police for the purpose of making an arrest upon discovery by school personnel of contraband weapons. This directive applies to contraband weapons possessed by "any person" on school property, but the concomitant "automatic superintendent's suspension" strongly implies that students are the intended subjects of this procedure. Regulations of the Chancellor, No. A-430, July 1, 1983, pp. 1-2.⁶

The Court of Appeals for the Fifth Circuit, after noting the agreement of most recent cases, correctly concluded that it is "beyond question that the school official, employed and paid by

⁶The Chicago Board of Education has promulgated a similar rule, incorporated in its Uniform Discipline Code, which specifies that a "Principal or administrator must swear out a complaint if arrest is warranted. [emphasis in the original]." Board of Education, City of Chicago, 1982.

the state and supervising children who are, for the most part compelled to attend, is an agent of the government and is constrained by the fourth amendment." Horton v. Goose Creek Independent School District, 690 F.2d at 480.

The doctrine of in loco parentis does not undermine the conclusion that a search of a student conducted by a public school official is governmental rather than private action.

As the United States Court of Appeals for the Fifth Circuit recently stated, it no longer makes sense to view a public school official as the equivalent of a parent since the school official's duties "are not always exercised with only the child who is being disciplined or searched in mind" and since "frequently action toward one child will be taken to protect other children from him." Horton v. Goose Creek Independent

School Dist., 690 F.2d at 481 n. 18. The Court of Appeals added that, "in a compulsory education system, the parent does not voluntarily yield his authority over the child to the school, so the concept of delegated authority is of little use." Id. (citations omitted).

Legal obligations of public school officials to report students' violations of the law to the police (supra at 20-22) sharply distinguish the role of the contemporary public school official from that of one standing in place of a parent.

This Court, in the context of corporal punishment, has recognized the demise of the concept that a teacher's authority derives from that of parents. Ingraham v. Wright, 430 U.S. 651, 661-662 (1977). The doctrine of in loco parentis does not transcend constitutional rights and cannot be used to re-

move school searches from Fourth Amendment scrutiny. Picha v. Wielgos, 410 F.Supp. 1214, 1218 (N.D. Ill. 1976); Jones v. Latexo Independent School District, 499 F.Supp. 223, 236 (E.D. Texas 1980).

In the instant case, Mr. Choplik, asserting his authority as the assistant vice principal of a public high school, conducted a search of the student T.L.O. Public school officials may not exercise such governmental authority unconstrained by the Fourth Amendment. The Bill of Rights must be honored, as well as taught, in American public schools.

B. T.L.O. Had a Legitimate Expectation of Privacy in the Contents of Her Purse While On School Grounds, Entitling Her to the Protection of the Fourth Amendment

This Court has repeatedly held that public school students do not shed their constitutional rights at the schoolhouse gate. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). While this Court has not decided the precise issue of the Fourth Amendment's applicability to public school students, the overwhelming majority of courts that have addressed this issue have concluded that public school students have an expectation of privacy protected by the Fourth Amendment. See, e.g., Horton v. Goose Creek Independent School Dist., 690 F.2d at 478; Jones v. Latexo Independent School Dist., 449 F. Supp. at 234 Interest of L.L., 90 Wis.2d 585, 594-95, 280 N.W.2d 343, 348 (Ct. App. 1979). This nearly unbroken line

of authority accurately reflects society's perception that public school students have a justifiable expectation of privacy.⁷

Fourth Amendment safeguards apply when "the person invoking [the] protection can claim a 'justifiable', a 'reasonable', or a 'legitimate expectation of privacy' that has been invaded by government action." Hudson v. Palmer, ___ U.S. ___, 104 S.Ct. 3194, 3199 (1984) (quoting Smith v. Maryland, 442 U.S. 735, 740 (1979)); Katz v. United States, 389 U.S. 347, 360-61 (1967) (Harlan, J. concurring). In addition, the expectation of privacy must be of a kind that "society is prepared to recognize

⁷Virtually every commentator has reached the identical conclusion. See, e.g., Buss, The Fourth Amendment and Searches of Students in Public Schools, 59 Iowa L.Rev. 739, 792 (1974); Comment, Students and the Fourth Amendment: "The Torturable Class," 16 U.C.D.L.Rev. 709, 718-20 (1983).

as reasonable." Hudson v. Palmer, 52 U.S.L.W. at 5054 (quoting Katz v. United States, 389 U.S. at 360, 361).

"Determining whether an expectation of privacy is 'legitimate' or 'reasonable' necessarily entails a balancing of interests." Hudson v. Palmer, ___ U.S. ___, 104 S.Ct. at 3200. The strong privacy interest of the public school student must be balanced against the state's interest in maintaining an environment conducive to learning. Without diminishing the state's interest, amici contend that the balance must be struck in favor of the student's privacy interest in his or her person and effects.

Public school students have more than a mere subjective expectation of privacy while attending school. Unlike the case of convicted incarcerated prisoners, society acknowledges a reason-

able expectation of privacy in a public school student's person and belongings.

Despite the existence of school disciplinary problems, society has never indicated that public school students should be absolutely deprived of all privacy interests while attending school. The public school's legitimate interest in maintaining an environment conducive to learning is not in any way incompatible with the recognition of a reasonable privacy expectation for public school students. Surely, society is unwilling to equate public school students with incarcerated inmates for Fourth Amendment purposes.

Furthermore, society has chosen to grant a reasonable expectation of privacy in the contents of one's purse, wallet or pocket. United States v. Monclavo-Cruz, 662 F.2d 1285, 1287 (9th Cir. 1981). Searches of purses, like

searches of clothing and pockets, are the functional equivalent of a search of a person. See, e.g., United States v. Graham, 638 F.2d 1111, 1114 (7th Cir. 1981); United States v. Jeffers, 524 F.2d 253, 256 (1975); Dawson v. State, 40 Md.App. 640, 653, 395 A.2d 160, 167 (1978); Stewart v. State, 611 S.W.2d 434, 438 (Tex.Crim.App. 1981). A typical purse, particularly one carried by an adolescent female, is likely to contain a wide array of necessary and intimate items, such as feminine hygiene products, love letters, pictures, medications, a diary and a wallet.⁸

⁸Petitioner's contention that a student's purse is an item unnecessarily brought into the school and therefore not entitled to Fourth Amendment protection is fundamentally at odds with the realities of contemporary society. Supplemental Brief for Petitioner Upon Reargument at 25. As demonstrated above, a purse normally contains some of life's necessities, such as money, keys and identification, as well as a host of personal articles.

Besides the nature of the articles, the essentially private character of a purse or handbag is illustrated by the fact that it is normally zippered or otherwise closed. Its contents are not usually subject to public view. Moreover, if exposed to the public, many of these items would cause extreme embarrassment, mortification or emotional harm.

The Seventh Circuit equated the search of a shoulder purse to that of a person and made the pragmatic observation that:

The human anatomy does not naturally contain external pockets, pouches, or other places in which personal objects can be conveniently carried. To remedy this anatomical deficiency clothing contains pockets. In addition, many individuals carry purses or shoulder bags to hold objects they wish to have with them. Containers such as these, while appended to the body, are so closely associated with the person that they are identified with and included within the concept of one's person. To hold differently would be

to narrow the scope of a search of one's person to a point at which it would have little meaning.

United States v. Graham, 638 F.2d at 1114. See also, 2 W. LaFave, Search and Seizure, sec. 5.3, at 307 (1978).

Public school students have the right to expect that their privacy interest in a purse or handbag will be upheld in the public school setting. Societal expectations of privacy are not extinguished at the schoolhouse door. Thus, the Fourth Amendment applies in the context of the public school.

POINT II

THE SEARCH OF T.L.O.'S PURSE BY A PUBLIC SCHOOL OFFICIAL VIOLATED THE FOURTH AMENDMENT.

A. Searches of Public School Students By Public School Officials Must be Subject to the "Probable Cause" Standard of the Fourth Amendment.

Consideration of the language of the Fourth Amendment and of this Court's Fourth Amendment jurisprudence compels a determination that "probable cause" is the standard to be applied to searches of students by public school officials. It is a cardinal principle that "'searches conducted outside the judicial process, without prior approval of a judge or magistrate, are per se unreasonable under the Fourth Amendment --subject only to a few specifically established and well-delineated exceptions.'" Mincey v. Arizona, 437 U.S. 385, 390 (1978) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

In creating the few, narrow excep-

tions to the warrant and probable cause requirement, the Court has balanced the governmental interests at stake against the nature and scope of the intrusion on individual privacy. Terry v. Ohio, 392 U.S. 1, 20-31 (1967). While the state's interest in a school environment conducive to learning is legitimate, there is no reason for the Court to adopt a broad new exception to the Fourth Amendment's warrant and probable cause requirement in order to advance that interest.⁹ Considering the high expectation of privacy young children have in their person and personal belongings, the psychological trauma that unrestricted searches might

⁹There is no need for the Court to place school searches in a "special category" as proposed by the Justice Department. The "exigent circumstance" exception already provides school officials with the flexibility necessary to respond quickly to situations that pose an immediate threat to school safety. See, Warden v. Hayden, 387 U.S. 294 (1967).

produce, and the adverse consequences to a proper educational atmosphere resulting from unreasonable searches, strict compliance with constitutional safeguards for student searches is compelled.

In support of their argument that an exception to the warrant and probable cause requirement be created for student searches, Petitioner and the Department of Justice cite a number of cases in which the Court has allowed searches under relaxed Fourth Amendment standards. In none of the cases cited, however, can support be found for an argument that public school students be subjected to diluted Fourth Amendment standards.

The analogy that the Department of Justice attempts to draw between the search of a public school student in the case at bar and administrative searches by health inspectors in Camara v. Muni-

cipal Court, 387 U.S. 523, (1967) does not survive scrutiny. The Court in Camara, in fact, refused to adopt an exception to the Fourth Amendment warrant requirement, stating that "administrative searches ... are significant intrusions upon the interests protected by the Fourth Amendment...." 387 U.S. at 534. - While the Court did state that the facts that would justify an inference of probable cause to make an administrative inspection are different than those that would justify such an inference in a criminal investigation, the Court emphasized that the less stringent probable cause standard was authorized because inspections of dwellings for violations of building codes are not "personal in nature" and because they entail a rather limited invasion of a citizen's privacy. Id. at 537.

Equally spurious is the argument

that the "stop and frisk" exception to the warrant and probable cause requirement authorized by Terry v. Ohio, 392 U.S. 1, is analogous to a full-scale search of a public school student. The decision in Terry to allow warrantless "pat downs" of a person's outer clothing based on reasonable suspicion turned on the fact that such searches involved a limited intrusion on privacy and were not aimed at the discovery of crime.

Searches of schoolchildren by public school officials, however, do not always involve "limited" intrusions on the students' privacy interest and indeed are often "personal in nature." A number of searches of the person have been reported in cases in which school officials have searched the purses of female students¹⁰, the pockets of male

¹⁰State in the Interest of G.C., 121 N.J.Super. 108, 296 A.2d 102 (J.D.R.C. 1972).

students¹¹, a boy's socks¹², and cases in which students were subjected to strip searches because they were suspected of possessing drugs, weapons or missing money.¹³

If, as Petitioner suggests, violations of school rules are to be analogized to violations of administrative or regulatory codes, the scope of the

¹¹In re Fred C., 26 Cal.App.3d 320, 102 Cal.Rptr. 682 (1972); State v. Walker, 190 Or.App. 420, 528 P.2d 113 (1974); State v. Young, 234 Ga. 488, 216 S.E.2d 586 (1975), cert. denied, 423 U.S. 1039 (1975); Commonwealth v. Dingfelt, 227 Pa.Super. 380, 323 A.2d 145 (Super.Ct. 1974); Interest of L.L., 90 Wis.App.2d 585, 280 N.W.2d 343 (Ct. of App. 1979).

¹²People v. Singletary, 37 N.Y.2d 310, 333 N.E.2d 369, 372 N.Y.S.2d 68 (Ct.App. 1975); State v. F.W.E., 360 So.2d 148 (Fla.Dist.Ct.App. 1978).

¹³Doe v. Renfrow, 475 F.Supp. 1012, 1020 (N.D.Ind. 1979), modified, 631 F.2d 91, reh'g denied, 635 F.2d 582 (7th Cir. 1980), cert. denied, 451 U.S. 1022 (1981); Bellnier v. Lund, 438 F.Supp. 47 (N.D.N.Y. 1977); People v. Scott D., 34 N.Y.2d 483, 315 N.E.2d 466, 385 N.Y.S.2d 403 (1974); M.J. v. State, 399 So.2d 996 (Fla.Dist.Ct.App. 1981).

searches permitted should be similarly limited. Strip searches, searches of purses, pockets and socks, are not merely limited intrusions of the kind associated with the relaxed standards of reasonableness in Camara and Terry.¹⁴

The search in issue in the instant case constituted a significant intrusion on T.L.O.'s privacy and dignity. Not only did the assistant vice principal

¹⁴Petitioner's argument that searches of public school students are also analogous to administrative inspections of heavily regulated industries does not fare any better under scrutiny. For reasons of public policy, the Court created an exception to the warrant -probable cause requirement for limited searches of certain heavily-regulated industries because such businesses voluntarily enter a regulated field on notice that they are subject to periodic inspections. United States v. Biswell, 406 U.S. 311 (1972) (firearms business); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (liquor business). It cannot likewise be said that public school students, for whom school attendance is compulsory, voluntarily relinquish their privacy rights by entering the school grounds.

lack probable cause to conduct the full-scale search of T.L.O.'s purse, but, as the New Jersey Supreme Court found, the search could not even be justified on a less stringent "reasonable grounds" standard. State in the Interest of T.L.O., 94 N.J. 331, 463 A.2d 934 (1983). The assistant vice-principal had at best a "good hunch" that T.L.O.'s purse contained cigarettes. Id. at 347, 463 A.2d at 942. There was no necessity to conduct the search to avert any particular danger and the wholesale rummaging through the contents of T.L.O.'s purse violated her reasonable expectation of privacy. Possession of cigarettes in school was permitted; the contents of T.L.O.'s purse had no direct bearing on the alleged infraction. Moreover, there were absolutely no exigent circumstances to justify a search of her purse.

The warrant and probable cause requirement of the Fourth Amendment strikes an appropriate balance between the privacy rights of public school students and the public school's interest in maintaining an orderly environment conducive to learning. If the Court finds, however, that the school setting is appropriate for an exception to the warrant requirement, the Court should still hold that probable cause is required for warrantless searches.

Particularly in a case like the one at bar, where the fruits of a search result in a juvenile delinquency proceeding, it is clear that if the probable cause requirement is not applied, the student will not be afforded the same constitutional protections that an adult would enjoy in a criminal proceeding. State v. Mora, 307 So.2d 317 (La.), vacated sub nom. Louisiana v.

Mora, 423 U.S. 809 (1975), modified, 330 So.2d 900 (La.), cert. denied, 429 U.S. 1004 (1976). See also, State v. Young, 234 Ga. 488, 499-500, 216 S.E.2d 586, 594 (Gunter, J., dissenting), cert. denied, 423 U.S. 1039 (1975). It is now well settled that the juvenile justice system must reflect the fundamental fairness that the Constitution guarantees adult defendants. See In re Gault, 387 U.S. 1 (1967).

B. The Scope of the Search of Respondent's Purse Violated the Fourth Amendment's Ban on Unreasonable Searches.

Whether the Fourth Amendment standard adopted by the Court is characterized as probable cause or as some lesser standard such as "reasonable grounds," school searches must also be scrutinized as to their overall reasonableness in

order to pass constitutional muster.¹⁵

Under the two-tiered approach adopted by the New Jersey Supreme Court,¹⁶ it must first be determined whether the school official had the requisite quantum of suspicion for initiating the search. Second, it must be determined whether the scope of the search that was conducted was "reasonable". In the case

¹⁵For example, it would be absurd to argue that a search to discover evidence of a violation of a gum-chewing regulation would be reasonable under the Fourth Amendment, even if the school official conducting the search had probable cause to believe that the student had committed such a violation and had incriminating sticks of gum secreted somewhere on his or her person.

¹⁶The Court stated that searches will be deemed reasonable "if school officials have reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order, and the search itself was reasonable in scope." State in the Interest of T.L.O., 94 N.J. at 349, 463 A.2d at 943 (emphasis added).

at bar, the assistant vice principal did not have probable cause, or even reasonable grounds, to initiate a search, and the search to which T.L.O. was subjected was so intrusive of her personal privacy and dignity that it violated the general Fourth Amendment proscription against unreasonable searches.

In determining whether a search itself was "reasonable", the student's interest in the privacy and security of his or her person must be balanced against the state's interest in a safe and secure school environment that is conducive to learning. In determining whether the scope of a particular search is reasonable, courts have considered factors such as the threat to safety and security in the object sought to be obtained, the child's age, the scope and intrusiveness of the search and the exigencies of the situation. See, e.g.,

People v. Scott D., 34 N.Y.2d 483, 489, 358 N.Y.S.2d 403, 408, 315 N.E.2d 466, 470, (1974). Cf. Ingraham v. Wright, 430 U.S. 651, 662 (1977).

It is common knowledge that a young woman's purse may contain a number of highly personal and intimate articles. It is also common knowledge that a search of the contents of another's purse or handbag would be considered an extreme invasion of privacy. Such searches have been equated with the search of the person. See, supra, Point I,B at 29-30 and citations therein.

In spite of T.L.O.'s recognized interest in the privacy and security of her person, the assistant vice principal demanded her purse, opened it, rummaged through its entire contents, unzipped closed compartments, and read her personal correspondence. An intrusive search of this magnitude was patently

unreasonable. There was simply no legitimate purpose for the search; the assistant vice principal already had the account of a teacher who had witnessed the infraction, and a search of T.L.O. could only establish that she had cigarettes in her purse, the possession of which violated no school rule. The state's interest in determining whether T.L.O. was in possession of a package of cigarettes is greatly outweighed by her interest in the privacy and dignity of her person.

Limitations on the power of governmental officials to conduct searches are necessary to ensure that school children are protected against unwarranted intrusion by the state into their privacy and dignity, particularly in light of the psychological harm such searches might

produce.¹⁷

While the interest of public school officials in maintaining order and discipline in the schools is certainly legitimate, this interest can properly be achieved without depriving public school students of their Fourth Amendment rights. There is no basis in the Constitution to deny public school chil-

¹⁷See, Doe v. Renfrow, 631 F.2d 91, 93 (1980) (7th Cir. 1980) (Swygert, J., dissenting from the order denying the petition for rehearing). See also, e.g., Bellnier v. Lund, 438 F.Supp. 47 (N.D. N.Y. 1977) in which the court held that the strip search of an entire fifth grade class after one student claimed that \$3.00 was missing from his coat pocket was unconstitutional. (The money was never found.) Id. at 47.

Another dramatic example of an intrusive search resulting from school officials' unfettered discretion to conduct searches was reported in Mississippi. Approximately 30 fifth- and sixth-grade girls were called into the restroom and were individually asked to raise their dresses and lower their underpants simply to determine who might have left a soiled sanitary napkin on the floor of the restroom. Jackson (Mississippi) Clarion-Ledger, October 6, 1978, at 1A, col. 4.

dren the minimum protections of the Fourth Amendment; indeed, sound policy reasons exist that warrant a deep judicial concern for the rights of school-children to protection from unconstitutional searches and seizures. (See Point III, infra). It is precisely these concerns that led the Court to state: "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Shelton v. Tucker, 364 U.S. 479, 487 (1960).

POINT III

PUBLIC POLICY CONSIDERATIONS REQUIRE THAT SUBSTANTIVE LIMITATIONS BE PLACED UPON THE POWER OF PUBLIC SCHOOL OFFICIALS TO SEARCH PUBLIC SCHOOL STUDENTS.

When public students are made secure from arbitrary and intrusive searches that threaten their privacy, significant benefits inure to the overall educational process. Respect for educational authorities and institutions is enhanced, fairness in the administration of school discipline is promoted, and an atmosphere conducive to learning is encouraged. By placing substantive limitations on the power of public school officials to conduct student searches, both in terms of the sufficiency of the grounds to initiate a search and in terms of the reasonableness of the scope of the search, this Court will strike a much needed balance between the students' privacy rights and

the public school officials' duty to maintain an orderly environment.

The erosion of privacy and human values associated with privacy may be a greater danger, in the long run, than the conduct sought to be deterred with the aid of student searches. Buss, William, "The Fourth Amendment and Searches of Students in Public Schools, 59 Iowa L.Rev. 739, 792 (1974). The state interest in promoting an environment conducive to learning would, in fact, be undermined by allowing school officials unbridled discretion to conduct student searches. As the National School Boards Association recently reported:

Policy makers who hope to secure such an [safe and orderly school] environment cannot merely rely on external controls - such as more visible police, more guards, or better alarm systems - or traditional approaches - such as punishment, removing troublemakers, and similar measures - which often harden delinquent behavior pat-

terns, alienate troubled youths from the schools, and foster distrust.

National School Boards Association,
Towards Better and Safe Schools (1984)
at 9.18

Social values, reasoning processes and behavioral patterns are to a great extent shaped by experiences in the formative years of human development.

¹⁸This observation was confirmed by an National Institute of Education-sponsored study of 600 schools which concluded that the more punitive teachers' attitudes and behavior were, the more likely teachers were to be the victims of crime and verbal abuse in school. G. Gottfredson and D. Daiger, "Disruption in 600 Schools," (November, 1979) ERIC #ED-183-701. A study of 500 schools specifically identified as having good discipline practices concluded that a common characteristic of these schools was their success in making students feel that they were welcome in the school and that they had some control over their environment. W. Wayson, et al., Handbook on School Discipline, at 10 (1982). Amici's experience representing suspended students reveals that students perceive invasions of their privacy to be at least as punitive as verbal criticism or a referral to the dean.

The school, through its policies and programs, plays a large part in socializing students toward the ethical application of legal principles. When public school officials infringe upon student privacy, they teach an unintended lesson of disrespect for the rights and needs of others. As one researcher noted:

What educators must realize...is that how they teach and how they act may be more important than what they teach.... And children are taught a host of lessons about values, ethics, morality, character, and conduct every day of the week, less by the content of the curriculum than by the way schools are organized, the ways teachers and parents behave, the way they talk to children and to each other.

C. Silberman, Crisis in the Classroom, at 9 (1970).

Strict adherence to constitutional principles is particularly important in the schools if children are to learn that the Fourth Amendment and other constitutional protections are more than

empty promises. As this Court stated:

That [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

West Virginia Board of Education v. Barnette, 319 U.S. 624, 637 (1943).

Fourth Amendment rights are, after all, not "mere second-class rights but belong in the catalog of indispensable freedoms." Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting). Amici maintain that the withdrawal of constitutional protections in order to attack the disciplinary problem in the nation's schools is not only ineffective in solving the problem, but very likely will exacerbate it.¹⁹

¹⁹The Department of Justice overestimates the current extent of disciplinary problems in the public schools. (Brief for the United States as Amicus Curiae

While a certain amount of deference should be granted to school officials in the operation of public schools, experience has shown that abuses of the Fourth Amendment occur when searches are made arbitrarily.²⁰ As a result, many school

(footnote continued)

at 23-24) While there is no question that school disciplinary problems do sometimes disrupt learning, recent data shows that the problem of violence and vandalism, which increased during the 1960's and 1970's, has declined in recent years. See Moles, Trends on Crimes in Schools, (1983). From 1977 to 1982, the number of crimes of violence against the person that took place in schools dropped by 16.2 percent. National Crime Survey, U.S. Census Bureau (1982).

²⁰The reaction of students at Thomas Jefferson High School in New York City to an unannounced mass search for weapons is illustrative of the type of adverse effect that may unintentionally result from intrusions into the privacy of students. Students, arriving at school one morning, were met by thirty security officers who searched them using handheld metal detectors. Outraged, hundreds of students overturned tables, chairs, and desks and surged into the street in protest. As to the efficacy of the search, a school official reported that the students identified as among those most likely to be carrying weapons managed to evade the

districts have developed and implemented standards to be followed by public school officials when conducting searches of students, their personal belongings and lockers.

For example, the Richland County School District of Columbia, South Carolina, recently adopted standards governing school searches following an incident in which elementary school students were forced to remove their underwear as part of a search for a ten dollar bill missing from a teacher's purse. In the School Board's internal deliberations, it was agreed that the improper search resulted, in part, from the Board's lack of a formal policy on search and seizure. Minutes, Executive Session of Board of School Commissioners, Richland County School District One

(footnote continued)

search. New York Times, Nov. 11, 1982, at B3, col.1.

(October 18, 1983).²¹

Amici's experience reveals that the existence of substantive standards governing school searches has not proven to be burdensome for public school officials. In New York City, for example, a regulation of the Chancellor of the Board of Education detailing the limits on school searches and seizures has been promulgated and disseminated to every

²¹The new policy provides that student searches are to be conducted when there is:

"probable cause to believe that a student is in possession of weapons, illegal drugs, personal property wrongfully taken or withheld from another person, or other items harmful to the student or other students or to the welfare of the student body, teachers and administrative personnel"
(Emphasis added.)

Any search must be authorized by the principal and conducted under his or her supervision upon a determination that probable cause exists. The policy contains strict rules governing the scope of allowable searches and the procedures to be followed. Id.

public school principal. Chancellor's Regulation A-432-Search and Seizure By School Officials, City School District of the City of New York (Issued October 1, 1979).²²

The Detroit, Michigan Board of Education recently revised its code of student conduct, retaining substantive standards governing student searches. The code provides, in relevant part:

Students have rights which have been established and guaranteed by the Fourth Amendment to the United States Constitution protecting the right of privacy of their person and freedom from the unreasonable

²²The Chancellor hears administrative appeals from student suspensions and issues written decisions to clarify the school search regulations. In one case, the Chancellor ruled that the practice of automatically conducting searches of students referred to the dean's office for discipline was improper because it "ignored the need to ascertain individual suspicion prior to intruding upon the student's privacy rights." In the Matter of the Appeal of Renaldo F., Chancellor's Decision, Board of Education of the City of New York at 4 (November 23, 1982).

search or seizure of property. The following guidelines apply to the seizure of items in the student's possession and the search of a student's school property (locker, desk): (1) There must be reasonable cause to believe that the student is in possession of an article, possession of which constitutes a crime or rule violation, or reason to believe that the student possesses evidence of violation of a law; or (2) There must be reason to believe that the student is using his/her locker, desk or other property in such a way as to endanger his/her own health or safety or the health, safety and rights of other person.

Detroit Board of Education Policy on Discipline and Student Rights (adopted July 31, 1984).

The state interest in promoting safety and order in the public schools is not furthered and is often impaired by arbitrary and highly intrusive student searches. Requiring public school officials to comply with substantive search and seizure standards will not impede school officials in the exercise of their duties but will promote an or-

derly and systematic approach to problems of school discipline.

CONCLUSION

For the foregoing reasons, it is respectfully requested, that under the facts and circumstances of this case, this Court apply the traditional probable cause standard to the search of respondent's purse and affirm the judgment of the New Jersey Supreme Court.

Respectfully submitted,



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19

IN THE
Supreme Court of the United States
October Term, 1983

STATE OF NEW JERSEY,
Petitioner,

v.

T.L.O., A JUVENILE,
Respondent.

ON WRIT OF *CERTIORARI* TO THE
SUPREME COURT OF NEW JERSEY

**MOTION OF NATIONAL EDUCATION
ASSOCIATION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE AND BRIEF *AMICUS CURIAE***

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MOTION OF NATIONAL EDUCATION
ASSOCIATION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE

The National Education Association ("NEA") hereby moves for leave to file the attached brief amicus curiae. Counsel for the parties have not consented.

NEA is a nationwide employee organization, with a current membership of over 1.6 million. The vast majority of NEA's members are educators in public schools, colleges, and universities. Most of them are teachers. Among the purposes of NEA, as set forth in its charter, are "to . . . advance the interests of the profession of teaching and to promote the cause of education in the United States." To this end, NEA frequently takes part in

legal proceedings that bear on the rights of teachers and of students in the public schools.

The issue in this case is whether and to what extent the Fourth Amendment of the United States Constitution (as applied to the states through the Fourteenth Amendment) restricts teachers or other officials who wish to search students' personal effects for evidence of crimes or infractions of school rules. Two amici curiae have filed briefs in this case, purporting to represent the interests of the nation's educational community, and arguing that the Fourth Amendment should not apply to such searches at all.^{1/} Those briefs, filed on

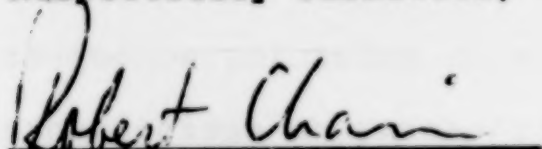
^{1/} Brief Amicus Curiae of National School Boards Association and Brief Amicus Curiae of National Association of Secondary School Principals, and the New Jersey Principals and Supervisors Association.

behalf of school boards and principals, contend that application of the Fourth Amendment would interfere with the legitimate need of the nation's schools to maintain discipline and a proper environment for learning. The teachers that NEA represents are in the front line in enforcing school discipline and maintaining an environment in which students can learn. NEA agrees that these goals are essential, but disagrees with the view that application of the Fourth Amendment is inconsistent with achieving them, as long as the standards of the Fourth Amendment are appropriately adapted to the special environment of the schools.

NEA thus has a perspective on this issue that is not being presented by anyone presently before this Court. We

believe that the attached brief amicus curiae will assist the Court in resolving the issues presented in this case. NEA therefore respectfully moves for leave to file the attached brief.

Respectfully submitted,



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BRIEF AMICUS CURIAE OF
NATIONAL EDUCATION ASSOCIATION

INTEREST OF THE AMICUS CURIAE

The members of NEA, who predominantly are teachers in the public schools, have a direct and vital interest in being able to fulfill their mission as public educators. As this Court has recognized, "Alone among employees of the [public school] system, teachers are in direct, day-to-day contact with students both in classrooms and in the other varied activities of a modern school." Ambach v. Norwick, 441 U.S. 68, 78 (1979). Teachers are the ones to whom it most immediately falls to maintain discipline and enforce school rules. They are the ones primarily responsible for

maintaining an environment in which they can practice their profession and in which students can truly learn. At the same time, however, teachers are the ones who bear the greatest responsibility for "inculcating [in students] fundamental values necessary to the maintenance of a democratic political system . . . " Id. at 77-79.

For these reasons, teachers are vitally concerned with the issue in this case: whether and to what extent the Fourth Amendment restricts a school official in searching students' personal effects for the purpose of uncovering evidence of a crime or a breach of school rules. Teachers need effective tools to maintain discipline in the modern schools, but at the same time they recognize the need to teach

students about fundamental constitutional principles by example as well as by textbook lessons.^{1/}

The interest of NEA, speaking for its members in this case, is thus to provide the Court with the perspective of a major component of the nation's educational system, as it bears on this case. We believe that this perspective will assist the Court in reaching a

^{1/} This Court's reasoning in holding that students enjoy fundamental First Amendment rights is instructive in this context as well:

That [schools] are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637 (1943).

reasonable accommodation between the needs of the schools to maintain discipline on the one hand, and the rights of students to personal privacy on the other.

ARGUMENT

The briefs of New Jersey and of two amici curiae^{2/} contend that the Fourth Amendment should have no application to school officials' searches of students and their personal effects. We agree with much that they say about the special needs of schools and the schools' special responsibility to maintain discipline, but we cannot

^{2/} Brief Amicus Curiae of National School Boards Association, and Brief Amicus Curiae of National Association of Secondary School Principals, and the New Jersey Principals and Supervisors Association.

agree that those considerations require that the Fourth Amendment be completely excluded from the schools. We believe that the Fourth Amendment can be applied to protect a reasonable degree of student privacy without interfering with the schools' ability to accomplish their important mission, as long as the Fourth Amendment is applied carefully, with sensitivity to the special circumstances of the schools. We believe that the decision of the New Jersey Supreme Court and the Brief for the United States in this Court spell out a sound reconciliation of these competing interests, and that the standard they offer for applying the Fourth Amendment in the schools is both

practical and fully consistent with the needs of the public schools.^{3/}

In this brief we will first address the argument that the Fourth Amendment should not apply at all, and then address some of the practical considerations that should govern the application of the Fourth Amendment to students in the schools.

I. THERE IS NO JUSTIFICATION FOR EXCLUDING THE FOURTH AMENDMENT FROM THE SCHOOLS ALTOGETHER

The basic guaranty of the Fourth Amendment is that "[T]he right of the people to be secure in their persons,

^{3/} That standard, as we understand it, is that school officials may search students' personal effects on school premises if they have a reasonable suspicion that the student possesses evidence of a crime or other activity that would interfere with school discipline and order. We take no position on the application of that standard to the facts of this case.

houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" That guaranty is broad, and it generally applies to persons, and their personal effects, wherever they may be found, within the boundaries of the United States.

To our knowledge, there is only one setting in which this Court has held that the Fourth Amendment does not apply at all to what is plainly a search of a person's "effects": a prison. In Hudson v. Palmer, ___ U.S. ___, 104 S. Ct. 3194 (1984), the Court held that a prisoner has no legitimate expectation of privacy and that the Fourth Amendment "has no applicability to a prison cell." Id. at 3202, 3205. In every other setting the Court has held that the Fourth

Amendment does apply to searches of persons and their effects, although the necessities of particular situations sometimes allow an entry or search without any reason to suspect that contraband or evidence of a crime may be found. E.g., United States v. Ramsey, 431 U.S. 606 (1977) (Fourth Amendment applies to border searches, but allows searches without cause of all persons or property entering the national borders); Michigan v. Tyler, 436 U.S. 499, 509-10 (1978) (Fourth Amendment applies to firefighters' entry for the purpose of putting out a fire and immediately determining its cause, but exigent circumstances dispense with any need for a warrant or a showing of cause for the investigation.)

The considerations that led this Court to carve out an exception to the Fourth Amendment for prison cells are unique to prisons.

Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial, criminal, and often violent, conduct. Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others.

Hudson v. Palmer, supra, 104 S. Ct. at 3200. The only reasonably effective way to maintain order in prisons and ensure the safety of prisoners, staff, and visitors is to maintain constant surveillance of prisoners. Id. For those reasons, the Court concluded that

[a] right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order.

Id. at 3201.

In the nation's schools, by contrast, a reasonable measure of privacy for students in their persons and effects is not inconsistent with the need to maintain order and discipline. There is no need for constant surveillance in the sense that it is required for prisoners; effective supervision of students in schools does not require the same kind of constant monitoring of the personal effects that students place in their lockers or carry with them to class. Students, unlike prisoners, cannot be presumed

antisocial, or unable to conform their conduct to school rules.

The argument is made, however, that a search of students by a school official is not the kind of search that should be covered by the Fourth Amendment, either because a school official is exercising an essentially private authority similar to that of parents, or because the Fourth Amendment was intended to apply only to officials who primarily engage in law enforcement.^{4/} Neither of these contentions justifies the complete exclusion of the Fourth Amendment from the schools.

^{4/} E.g., Supplemental Brief for Petitioner Upon Reargument, at 9-13; Brief Amicus Curiae of National School Boards Ass'n, at 8-14, 22.

First, it would be unrealistic to conclude that the authority exercised in the schools is private authority delegated by the parents to the school officials who stand in loco parentis during school hours. Although in a private school the authority over students may be exclusively private, in a public school it exists by virtue of laws compelling school attendance. The authority thus may bear a strong resemblance to the authority of parents, but its source is governmental rather than private. See 3 W. LaFave, Search and Seizure § 10.11, at 453-54 (1978).

Second, this Court has not limited the application of the Fourth Amendment to searches by officials whose job it is to enforce the criminal law or to enforce quasi-criminal regulations.

The terms of the Fourth Amendment are not so limited; they generally protect the right of the people to be free from unreasonable searches. "This Court frequently has relied on the explicit language of the Fourth Amendment as delineating the scope of its affirmative protections." Oliver v. United States, ___ U.S. ___, 104 S. Ct. 1735, 1740 n.6 (1984).

This Court has read into the Fourth Amendment only one limitation based on the identity of the person conducting the search: that it be done on governmental authority rather than by a private individual. Burdeau v. McDowell, 256 U.S. 465 (1921). The Court has rejected efforts to restrict the Fourth Amendment's application to those officers charged with enforcing the criminal law. In Camara v.

Municipal Court, 387 U.S. 523, 530-31 (1967), the Court held that the Fourth Amendment's protection of personal privacy is broader than just a protection from unreasonable criminal investigation. It is a general right to be free from unreasonable official intrusions into the privacy of an individual or his property. Id.; See v. City of Seattle, 387 U.S. 541, 543 (1967).

Similarly, in Michigan v. Tyler, supra, the Court held that the Fourth Amendment applies even to a fire-fighter's entry into a burning building to extinguish a fire or to investigate its cause for future fire prevention. 436 U.S. at 505. In analyzing the privacy interests that are protected by the Fourth Amendment, the Court did not see those interests as merely the right

to be free from an official entry to find evidence for a prosecution or a civil fine, but instead recognized the general right of privacy enjoyed by even "innocent fire victims" "living in their homes or working in their offices after a fire." Id. at 505, 510. See also 1 La Fave, supra, § 1.6, at 129-32.^{5/} These authorities, we

^{5/} See also Wyman v. James, 400 U.S. 309 (1971). The Court there held that a home visit by a welfare caseworker was not a search because it was merely an interview, it had a "rehabilitative" purpose and it was voluntary (the only consequence if the recipient denied entry to the caseworker was that the welfare aid would be withheld). Id. at 317-318. The fact that the social worker was not engaged in a criminal investigation was not relied upon to negate the existence of a search but only to support the Court's alternate holding that if the visit was a search, it was reasonable within the meaning of the Fourth Amendment. See id. at 318, 323.

submit, preclude a holding that the Fourth Amendment has no application to school searches simply because teachers and other school officials are not in the business of enforcing criminal laws or quasi-criminal regulations.

The risk of serious abuses by school officials, and the nature of those abuses when they occur, provide another reason why the Court should not carve out an exception and should not hold that the Fourth Amendment does not apply to students in the schools. There are a number of reported decisions documenting indecent intrusions into the personal privacy of school children by overzealous school officials. M.M. v. Anker, 477 F. Supp. 837 (E.D.N.Y.), aff'd, 607 F.2d 588 (2d Cir. 1979) (strip search of 15-year-old female

student without any information that a theft had occurred); Potts v. Wright, 357 F. Supp. 215 (E.D. Pa. 1973) (strip search of eight female junior high school students in search of a missing ring); Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), cert. denied, 451 U.S. 1022 (1981) (strip search of four junior high school students); Rone v. Daviess County Board of Education, 655 S.W.2d 28 (Ky. App. 1983) (strip search of male high school student); Stern v. New Haven Community Schools, 529 F. Supp. 31 (E.D. Mich. 1981) (observation of activity in boys' bathroom through two-way mirror). These searches are precisely the kinds of invasion of privacy that the Fourth Amendment was intended to prevent. That they occurred in the schools makes them no less a concern under the Fourth Amendment.

II. THE SPECIAL CHARACTERISTICS OF SCHOOLS NONETHELESS MUST BE CONSIDERED IN ARRIVING AT THE STANDARD THAT THE FOURTH AMENDMENT REQUIRES IN THE SCHOOLS

Even though the special characteristics of schools do not justify making the Fourth Amendment inapplicable altogether to searches of students, they do require that the Fourth Amendment standards be molded for special application to students in the schools. We agree generally with the standard applied by the New Jersey Supreme Court in this case, and with the analysis in the Brief for the United States. We agree that the appropriate standard for searching a student is reasonable suspicion that the student has committed a crime or violated a school rule. Rather than repeating the analysis that leads to

that conclusion, we write simply to call attention to some particular aspects of the issue, on which we believe the perspective of teachers may assist the Court.

1. It is immediately obvious that many of the specific restraints that the Fourth Amendment places on police investigations and searches cannot appropriately be applied in the schools. For example, in Brown v. Texas, 443 U.S. 47 (1979), the Court held that police cannot stop a person on the street, without reasonable suspicion that he has committed a crime, and compel him to identify himself and explain his presence. This rule would not be appropriate in the school setting, because of the legitimate interest that schools have in keeping students in their classrooms

during teaching periods. The freedom of citizens to move about on the public streets simply has no application to students in school. Accordingly, the rules that have evolved under the Fourth Amendment to govern police conduct should not be automatically applied in the schools without consideration whether the particular rule is appropriate in that setting.

2. The "reasonable suspicion" that is required in the schools to justify a search must not be limited to suspicion of criminal activity. Teachers are not in the business of enforcing the criminal laws, and unlike police officers, it is not their responsibility to know what conduct can be punished as crime. Instead the responsibility of teachers is to enforce the school rules that have been

adopted to preserve order and make learning possible. A teacher must have the necessary tools to enforce those rules. If a suspected violation of a rule threatens to disrupt the school or threatens to harm students, school officials should be free to search for evidence of it, or for the "instrumentality" of the infraction, even though no crime is involved. See, e.g., Marshall v. Barlow's, Inc., 436 U.S. 307, 320 (1978); Camara v. Municipal Court, supra, 387 U.S. at 535.

3. We do not understand any of the parties or amici curiae in this case to contend that reasonable suspicion, which is adequate to support a search of the student's pockets, book satchel, or purse, is adequate to justify the greater intrusion of a

strip search. This case obviously does not present any question whether school officials could ever appropriately conduct strip searches of students, but at a minimum such a search would require greater justification than the "reasonable suspicion" standard would provide. Cf., e.g., United States v. Brignoni-Ponce, 422 U.S. 873, 883 (1975) (use of "reasonable suspicion" standard for stopping an automobile near the border is justified in part by the "modest" intrusion that such a stop entails); 3 La Fave, supra, § 10.5(b), at 281-86 (a person entering the U.S. at a border is subject to a search of his personal effects without any cause at all, but it is an "established rule" that some degree of individualized

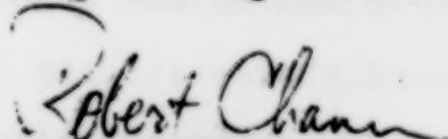
suspicion is necessary for a strip search.)^{6/}

4. Finally, it is worth noting that the justification for applying a "reasonable suspicion" standard to searches of students rests in large part on the special relationship between students and school officials and the special characteristics of youth. See Brief for United States, at

^{6/} Similarly, this case does not require a decision on the question whether schools can search students' lockers more freely than their pockets or purses. It is possible that a student's expectation of privacy in a locker could depend in part on the school's announced policy about searching lockers. But, we cannot agree with the suggestion made by Petitioner that simply because the school owns the lockers, it can search them at any time without reasonable suspicion. See Mancusi v. De Forte, 392 U.S. 364, 368 (1968); Cf. Gillard v. Schmidt, 579 F.2d 825, 829 (3d Cir. 1978).

18-19, 21. Those special considerations do not apply equally to adults who may be on school premises.

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AUG 29 1984

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF NEW JERSEY,

Petitioner,

—vs.—

T.L.O., a Juvenile,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

**SUPPLEMENTAL BRIEF OF THE AMERICAN CIVIL
LIBERTIES UNION AND THE AMERICAN CIVIL
LIBERTIES UNION OF NEW JERSEY, AMICI CURIAE,
IN SUPPORT OF RESPONDENT**

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INTEREST OF AMICI*

The American Civil Liberties Union ["ACLU"] and the ACLU of New Jersey were amici before this Court when this case was earlier accepted for plenary review. See Brief of the ACLU and ACLU of New Jersey Amici Curiae. Subsequent to briefing and argument, the Court on July 5, 1984 restored this case to the calendar for reargument and requested the parties to brief and argue an additional question:

Did the assistant principal violate the Fourth Amendment in opening respondent's purse in the facts and circumstances of this case?

In response to this additional question, petitioner for the first time has now argued that the Fourth Amendment should be entirely inapplicable to all searches conducted by all public school officials on all students.

* The parties have consented to the filing of this Supplemental Brief, and their letters of consent have been filed with the Clerk of the Court under Rule 36.2 of the Rules of this Court.

Although the Solicitor General, in his Brief for the United States as Amicus Curiae, has conceded the applicability of the Fourth Amendment, the Solicitor General nonetheless has argued that public school officials should be granted an unlimited categorical exception to the Fourth Amendment's probable cause requirement so as to allow all public school officials to search all students according to something akin to a mere hunch standard.

These government efforts to remove Fourth Amendment protections from public school students are, however, entirely at odds with the purpose and scope of the Fourth Amendment. Under this Court's rulings, there should be no doubt in the facts and circumstances of this criminal case that: first, the Fourth Amendment does protect students from unreasonable searches by public school officials; and second, there is applicable

here no categorical exception from the Fourth Amendment's probable cause requirement. In order to address these basic principles, we submit this Supplemental Brief in support of respondent.

SUMMARY OF ARGUMENT

Protection against arbitrary searches and seizures by government officials is essential to a democratic society premised on the integrity of the individual. Once a society permits arbitrary intrusions into the personal integrity of its citizens, it has crossed a fateful threshold which the Founders rightly believed is utterly incompatible with democratic self-government.

Totalitarian societies express the subordination of the individual to the group by subjecting their citizens to arbitrary intrusions into personal privacy which destroy their sense of individual autonomy

and self-worth. Free societies, because they respect the individual, refuse to permit intrusions into personal privacy in the absence of probable cause, or -- at an absolute minimum -- an objectively reasonable basis for believing that the target of the intrusion is in possession of evidence of unlawful activity.

While a policy of arbitrary intrusions into personal privacy is arguably more effective in the short-run in controlling its targets, the Founders realized -- and the 20th century bears tragic witness to their wisdom -- that government power to search and seize on less than probable cause (to say nothing of less than reasonably objective suspicion) destroys the sense of self-worth and the respect for individual dignity which is a precondition to effective democracy. The fundamental issue raised by this case is whether this Court will give way to appeals

to hysteria and sweep away the Founders' privacy protection from our public schools. In stark terms the issue is will our schools be training grounds for citizenship in a democracy or will they teach students that individual dignity is a myth from a bygone era that must give way to the law enforcement demands of a frightened majority?

In Hudson v. Palmer, No. 82-1630 (1984), this Court eliminated the Fourth Amendment as an effective protection of personal integrity in prison. By utilizing the circular concept of expectation of privacy, this Court ruled that since prisoners enjoy no expectation of privacy in their cells, they are entitled to no Fourth Amendment protection against even bad faith searches. Of course, the asserted need for constant surveillance over a criminal population in prison is hardly present in our schools, despite the strident assertions of certain school officials. Put

bluntly, the issue is whether American schools are to be equated with jails in defining the degree of personal privacy enjoyed by students.

The suggestion that children can be educated for citizenship in a democracy by teaching them that the need for order and discipline justifies searches on less than probable cause strikes at the value system that keeps us free. Not surprisingly, therefore, whether the case has arisen in the context of free speech,^{1/} religious liberty,^{2/} racial justice,^{3/} or procedural fairness,^{4/} this Court has recognized that our educational system cannot function in isolation from the constitutional values of a

1. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

2. Stone v. Graham, 449 U.S. 39 (1980).

3. Brown v. Board of Education, 347 U.S. 483 (1954).

4. Goss v. Lopez, 419 U.S. 565 (1975).

democratic society.

I. Petitioner's assertion that the Fourth Amendment proscribes unreasonable searches only by law enforcement officials is refuted by two converging lines of cases. First, as this Court recognized in such cases as Tinker, Stone, Brown, and Goss, students, who "are 'persons' under our Constitution," do not "shed their constitutional rights . . . at the schoolhouse gate." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 511 (1969). Second, as this Court recognized in such administrative search cases as Camara and See and their progeny, the Fourth Amendment safeguards the "privacy and security of individuals against arbitrary invasions" not just by police officers but "by government officials." Camara v. Municipal Court of San Francisco, 387 U.S. 523, 528 (1967). As a matter of constitu-

tional law, and on the record here, the Fourth Amendment is applicable to this criminal proceeding.

II. Contrary to the assertion made here primarily by the Solicitor General, in his Brief for the United States as Amicus Curiae, this case presents no opportunity for the Court to adopt and to apply a categorical exception to the Fourth Amendment's probable cause requirement for searches in the public schools. To the extent that a categorical exception arguably may be appropriate in response to particular dangers in the public schools, the exception could be created and applied only so long as it met the three-part analytical test set forth by this Court in Camara, 387 U.S. at 534-37: (a) the category of searches must be in response to and limited to confronting a grave public danger; (b) it must be shown that the public interest

would not be served under the traditional probable cause standard; and (c) the searches must constitute a relatively limited invasion of privacy compared with police searches for evidence of wrongdoing. Here, none of these three tests has been or can be met.

A. Although threats to school safety and security from student possession of weapons, drugs and other contraband may very likely constitute a serious public danger, regulation of the danger does not give rise to an unlimited categorical exception. Rather, categorical exceptions must be limited to the narrow purposes for which they are permitted. A border patrol stop, for example, is allowable for questioning about citizenship, immigration status, and any suspicious circumstances, but "any further detention or search must be based on consent or probable cause." United States v. Brig-

noni-Ponce, 422 U.S. 873, 881-82 (1975); cf.,
e.g., Terry v. Ohio, 392 U.S. 1 (1968).
Since the search by the assistant principal
here was not for weapons, drugs or other
contraband, this case does not concern the
applicability of any alleged categorical
exception designed to combat threats to
school safety or security.

B. Petitioner has not shown and
cannot show that the public interest would
not be served under the traditional probable
cause standard. Given the fact that school
officials "are in direct, day-to-day contact
with students both in the classrooms and in
the other varied activities of a modern
school," Ambach v. Norwick, 441 U.S. 68, 78-
79 (1979), it is apparent that the tradi-
tional probable cause standard can be met in
virtually every instance in which an other-
than-purely-arbitrary search is deemed neces-

sary. Moreover, in view of the "importance
of public schools in the preparation of indi-
viduals for participation as citizens, and in
the preservation of the values on which our
society rests," id. at 76, the public inter-
est here provides "reason for scrupulous
protection of Constitutional freedoms of the
individual," West Virginia State Board of
Education v. Barnette, 319 U.S. 624, 637
(1943).

C. Finally, a school official's
search of a student's purse is not a rela-
tively limited invasion of privacy compared
with police searches but instead is every bit
as intrusive. A purse, like a pocket, car-
ries a person's most intimate personal be-
longings. An invasion of that personal pri-
vacy for a female student -- revealing notes
from friends and items of personal hygiene
such as tampons or birth control pills -- can

be not just embarrassing, but traumatic. That a search through these personal items is made by a school official with whom the student has ongoing contact, rather than by a police officer with whom the student would have no further contact, in fact makes a school official's search even more intrusive into personal privacy.

Not only is the Fourth Amendment applicable here, but on the record in this criminal case there is no ground for a categorical exception to the Fourth Amendment's probable cause requirement.

ARGUMENT

This case raises two interrelated issues: first, what constitutional standard defines the degree of personal privacy enjoyed by students attending public schools pursuant to our Nation's commitment to free, compulsory public education; and, second,

what enforcement mechanisms should be available to assure compliance with the appropriate substantive standard? Important as these issues are, however, the factual and legal context of the case before the Court permits consideration of only a small portion of the general issue.

The Supreme Court of New Jersey, confronted with petitioner's attempt to use the fruits of the search of a student in its case-in-chief in a criminal proceeding against the student, ruled, first, that the substantive standard imposed by the Fourth Amendment on searches of students by educational officials was one of reasonable suspicion;^{5/} and, second, that the fruits of a

5. The standard articulated by the Supreme Court of New Jersey provided that:

. . . when a school official has reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order, the school official has
[cont'd. on next pg]

search on less than reasonable suspicion were inadmissible as part of the State's case-in-chief in this criminal proceeding.

The New Jersey Supreme Court did not rule on, and did not have the opportunity to rule on, whether evidence obtained in violation of the appropriate constitutional standard could be used by educational officials in an intra-school setting.^{6/} Given the factual and legal context in which this case arises and the decision of the court below,

the right to conduct a reasonable search for such evidence.

State in the Interest of T.L.O., 463 A.2d 934, 941-42 (N.J. 1983).

6. Entirely separate from this criminal case, and the only proceeding in which the assistant principal's search and seizure conduct was tested in the context of school disciplinary action, was the proceeding in the Superior Court, Middlesex County, Chancery Division, in which the court quashed T.L.O.'s suspension on the ground that the assistant principal's search and seizure in the context of school discipline had violated the Fourth Amendment. This decision was not appealed by defendant Piscataway Board of Education. No issue as to intra-school discipline is in this criminal case. State in the Interest of T.L.O., 463 A.2d 934, 937 n.2 (N.J. 1983).

we suggest that only a single narrow issue is actually before the Court: the fact-bound question of whether the majority below correctly applied its less-than-probable-cause legal standard to the facts of this case. This is hardly a substantial federal question worthy of review by this Court.

Only if the Court wishes to alter the "reasonable suspicion" standard articulated below by either raising the degree of probability to probable cause or reducing it to mere hunch is review appropriate. It is in this context that we have framed our response to the additional question presented by the Court.

I. THE FOURTH AMENDMENT, APPLICABLE TO THIS CRIMINAL PROCEEDING, PROTECTS STUDENTS AND THEIR "PAPERS AND EFFECTS" AGAINST UNREASONABLE SEARCHES BY PUBLIC SCHOOL OFFICIALS

The Fourth Amendment's protection of "people" and their papers and effects against

unreasonable searches and seizures protects "people" who are students, particularly in a criminal proceeding as here, against unreasonable searches by school officials. This undeniable conclusion^{7/} flows from two firmly established principles: that students as persons do not shed their constitutional rights at the schoolhouse gate; and that the Fourth Amendment safeguards individual privacy against arbitrary intrusions by government officials.

1. "Students in school as well as out of school are 'persons' under our Constitu-

7. The applicability of the Fourth Amendment to school officials is discussed more fully in our initial Brief of the ACLU and the ACLU of New Jersey Amici Curiae. That this proposition seems beyond dispute is revealed by petitioner's acceptance of the principle in its initial Brief for Petitioner; see also Oral Argument Transcript at 6-8. The principle similarly is not questioned, on rehearing, in the Brief for the United States as Amicus Curiae.

tion," and they accordingly "are possessed of fundamental rights which the State must respect." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 511 (1969). Stated otherwise, students do not "shed their constitutional rights . . . at the schoolhouse gate." Id. at 506.

In accord with these principles, as articulated and as applied in Tinker to protect students' First Amendment rights to free speech, this Court has repeatedly recognized that fundamental constitutional protections are accorded to students against intrusions by school officials. See, e.g., Island Trees Union Free School District v. Pico, 457 U.S. 853 (1982) (First Amendment protection against school censorship); Goss v. Lopez, 419 U.S. 565 (1975) (Fourteenth Amendment due process protection against school disciplinary action without notice and a hearing); Brown v. Board of Education, 347 U.S. 483

(1954) (Fourteenth Amendment equal protection against school segregation); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) (First Amendment protection against compulsory flag salute and pledge);^{8/} cf. In re Winship, 397 U.S. 358 (1970) (Fourteenth Amendment due process protection against allowing less than proof beyond a reasonable doubt in juvenile proceedings); In re Gault, 387 U.S. 1 (1967) (Fourteenth Amendment guarantee of procedural due process in juvenile proceedings).

8. This is not to say that all protections found in the Constitution must be accorded to students (or adults) vis-a-vis the actions of school officials, since some constitutional protections are limited by their own terms. Thus, this Court's decision in Ingraham v. Wright, 430 U.S. 651 (1977), holding the Eighth Amendment inapplicable to public school corporal punishment, is not contrary to the authority above since the three parallel proscriptions in the Eighth Amendment limit only "the power of those entrusted with the criminal-law function of government," and in fact were designed only "to protect those convicted of crimes." Id. at 664. There are no such limitations as to the "people" protected by the Fourth Amendment.

2. "The basic purpose of [the Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." Camara v. Municipal Court of San Francisco, 387 U.S. 523, 528 (1967); see also See v. Seattle, 387 U.S. 541 (1967).

That school officials are government officials subject to constitutional constraints is made plain by the foregoing authority. That arbitrary invasions violative of the Fourteenth Amendment include administrative intrusions made by government officials and not just criminal searches made by police officers is made plain not only by Camara (housing official) and See (building inspector) but by countless other decisions by this Court, see, e.g., Michigan v. Clifford, No.82-357 (1984) (fire department officials); Marshall v. Barlow's, Inc., 436 U.S.

307 (1978) (OSHA inspectors); cf. Michigan v. Tyler, 436 U.S. 499 (1978) (firefighters).

3. The convergence of these two lines of authority leaves no question that students are protected by the Fourth Amendment against intrusive searches not only by police officials, Washington v. Chrisman, 455 U.S. 1 (1982), but also by school officials particularly where, as here, the official conduct leads to a criminal proceeding.

Although petitioner initially conceded the applicability of the Fourth Amendment here, see supra note 7, as does the United States, id., petitioner in its Supplemental Brief Upon Reargument at 10-14 now asserts that the Fourth Amendment, under an historical analysis, proscribes unreasonable searches only by law enforcement officials. Petitioner's assertion, however, conveniently overlooks the importance of this Court's

decisions in Camara and See and their progeny, and also ignores the powers conferred by New Jersey statutes on school officials to regulate student conduct and to impose serious punishment, compare State in the Interest of TLO, 463 A.2d 934, 940 (N.J. 1983), with Goss v. Lopez, 419 U.S. 565, 574-76 (1975). Equally flagrant is petitioner's disregard of the often-intimate working relationship between school officials and police officials, a relationship which is required as a matter of law in many states^{9/} and which is a matter of record in this case: "The police were immediately called, and they took T.L.O. to police headquarters." State in Interest of T.L.O., 448 A.2d 493, 495 (N.J. App. Div. 1982) (Joelson, J., dissenting); compare Camara, 387 U.S. at 530-31: "In some

9. See the discussion and citations in our initial Brief of the ACLU and ACLU of New Jersey Amici Curiae at 21-22 n.9.

cities, discovery of a violation by the inspector leads to a criminal complaint."

On this record, the Fourth Amendment is applicable to this criminal proceeding.

II. IN THE FACTS AND CIRCUMSTANCES OF THIS CASE, THERE IS NO BASIS FOR A BROAD CATEGORICAL EXCEPTION TO THE FOURTH AMENDMENT'S REQUIREMENT OF PROBABLE CAUSE FOR SEARCHES IN PUBLIC SCHOOLS

Except in certain carefully defined classes of cases, a nonconsensual search or seizure is unreasonable without a warrant and probable cause.^{10/} Although we agree with

10. We do not separately address the issue whether a warrant would be required for school searches. That is a separate and distinct question from that of whether such searches may be made upon a lesser showing than is typically needed to establish probable cause. As Camara illustrates, the considerations which bear on these questions are quite different.

Even if, as we submit, the traditional probable cause standard applies here, it does not follow that a warrant would be necessarily required in all circumstances:

In the school and college search cases, the warrant issue would seem to arise only as to the search of a place, such as a locker or dormitory room. Generally, the law has not required search
[cont'd. on next pg]

the Solicitor General's observation that the reasonableness of particular classes of searches or seizures generally is determined on a categorical basis rather than a case-by-case approach, such an analysis does not justify placement of school searches in a special categorical exception to the probable cause requirement.

Arguing for a "reasonable suspicion" standard, the Solicitor General and petitioner's other amici rely primarily on the notion that a reduced level of suspicion ought to be applied when the search is not one by police or uniformed authority and is

warrants for the search of a person. And while it is true that most such searches are made incident to arrest, . . . it does not follow that a warrantless search of a student by school authorities is improper simply because there is no arrest. Given the authority of the school officials to maintain some degree of control, "it does not seem important that the technical concepts of 'arrest' and 'stop' be adopted as such for school administrator searches."

La Fave, Search and Seizure, § 10.11(d) at 469 (footnotes and citation omitted).

not instigated as a criminal investigation.^{11/} This Court, however, in the admi-

11. The Solicitor General also argues for a lower level of reasonableness based on the doctrine of in loco parentis, on analogies to border searches and pervasively regulated businesses, and on the alleged constitutional substitute of public scrutiny. See Brief for the United States at 17-25. This shotgun approach misses the mark. Conceding that the benevolent in loco parentis doctrine "does not fit easily within a compulsory system of education," the Solicitor General argues that the concept nevertheless retains vitality in the context of an inquiry into "reasonableness" because the public school official assumes "custody" of the student during school hours. Brief for the United States at 20-21. In an artful, but ultimately inapposite use of the "community caretaking" rationale (which has been applied in the automobile inventory cases for warrantless searches by police with custody and control over the object searched), the Solicitor General argues that the "analogous" custody and responsibility of school officials for students compel a similarly lowered threshold of suspicion for school searches. That argument ignores crucial distinctions between the two types of searches. The search at issue here, of course, involved a personal search, not a search of an "object" over which the school official had custody or control. More importantly, however, the "caretaking" rationale arises in a non-investigatory setting in which the police, in taking an inventory, merely follow standard property protection procedures. Cady v. Dombrowski, 413 U.S. 433 (1973). Here, in contrast, the search was conducted for the express purpose of discovering evidence of wrongdoing.

Also beside the point is the Solicitor General's reliance on attempted analogies to border searches, e.g., United States v. Ramsey, 431 U.S. 606 (1977) (opening international mail at border in search of

[cont'd. on next pg]

nistrative search cases of Camara v. Municipi-

customs violations) and searches of certain pervasively regulated businesses such as firearms dealers, e.g., United States v. Biswell, 406 U.S. 311 (1972). Neither of these settings provides a persuasive analogy to the public school context, where attendance is compulsory, and searches have not been limited by statutory or regulatory guidelines. First, both border searches and searches under regulatory inspection systems have been carefully limited in place and scope. See United States v. Ramsey, 431 U.S. at 623 (applicable postal regulations flatly prohibit the reading of opened mail absent a search warrant); Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970) (Congress authorized a fine, not forcible entry, for failure to permit inspection of liquor stored on premises). Second, persons crossing a border and persons entering a pervasively regulated business (which deals in inherently harmful or dangerous substances or processes) do so with full knowledge of being subject to inspection. The suggestion that school students, under compulsory attendance rules, voluntarily "waive" full Fourth Amendment protections for the duration of their school years cannot be sustained.

The Solicitor General's final contention, that public scrutiny over the schools is sufficient to repeal the Fourth Amendment's full protection for students, must also be rejected. Nowhere in Ingraham v. Wright, 430 U.S. 651 (1977), did this Court deny to students qua students any Eighth Amendment rights which are available only to persons "convicted of crimes," id. at 664. See supra note 8. Constitutional rights -- such as those recognized in Tinker, Stone, Brown, and Goss, and such as that at issue here -- neither evaporate nor are subject to popular vote whenever they are alleged to be under public scrutiny. Cf. Cooper v. Aaron, 358 U.S. 1 (1958).

pal Court of San Francisco, 387 U.S. 523 (1967), and See v. Seattle, 387 U.S. 541 (1967), explicitly rejected the claim that lesser Fourth Amendment standards apply where the searching official is not a police officer or where the objective of the search is not a criminal prosecution.

Instead, the Court ruled that the constitutionality of an exception to the ordinary requirement of probable cause involves "balancing the need to search against the invasion the search entails," and outlined three factors to be weighed under such a balancing test: (a) whether the search is in response to a unique and grave public danger which must be dealt with by means which will be highly effective; (b) whether the relevant public interest would not be served under the traditional probable cause standard; and (c) whether the search constitutes a relatively limited invasion of privacy compared with the

typical police search for evidence of crime. Camara, 387 U.S. at 534-37; cf. Brown v. Texas, 443 U.S. 47, 51 (1979) (determining the validity of an alleged categorical exception to the traditional requirement of probable cause "involves a weighing" of the "gravity of the public concerns served by the seizure" and the "degree to which the seizure advances the public interest" compared with the "severity of the interference with individual liberty"). In Camara, all three of the factors were met, with the result that searches on less than probable cause were accordingly permissible. Similarly, if public school searches under a standard less than probable cause "are to pass muster under Camara", all three of the factors must be met. See LaFave, Search and Seizure, § 10.11 at 457-58. None of the three requirements are met here.

In the facts and circumstances of this

case, the categorical exception urged by petitioner and its amici cannot be justified under the Camara requirements. A search to determine a student's credibility following a teacher's eye witness report of unauthorized cigarette smoking does not constitute a relevant means of responding to theoretical threats to school safety and security posed by weapons and drugs, especially where the search entails an intrusive invasion of personal privacy.

A. ANY CATEGORICAL EXCEPTION TO THE FOURTH AMENDMENT'S PROBABLE CAUSE STANDARD, RELEVANT TO PROTECTING STUDENTS FROM DRUGS, WEAPONS AND OTHER THREATS TO THE ACADEMIC ENVIRONMENT, MUST BE LIMITED TO SEARCHES DESIGNED TO PROTECT THAT INTEREST

Just as there is an undeniable public interest in inspecting "conditions which are hazardous to public health and safety" so as to prevent "fires and epidemics," Camara, 387

U.S. at 535, so too is there an important public interest in promoting school safety and security so as to protect students from weapons, drugs, and theft. The existence of a valid public interest, which may provide an initial justification for a proposed categorical exception from the probable cause standard, should not be used to authorize searches without particularized suspicion, should not be used to authorize the introduction of any "silver platter" fruits in a subsequent criminal proceeding, and, in any event, cannot be used to authorize unlimited searches' beyond those specifically designed to protect the identified public interest.^{12/} Here, the recognition of a

12. Responding to the asserted public interest of protecting students from weapons, drugs and theft, many lower courts -- with a startling lack of reference to the necessary limitations on categorical exceptions -- have allowed all school searches on less than probable cause rather than properly limiting the searches. Recognition of the valid public interest, however, is hardly sufficient in itself to justify an erosion of Fourth Amendment protections. As expressed [cont'd. on next pg]

categorical exception, as urged by petitioner and its amici, is not even properly before this Court for the simple reason that the assistant principal's search was never premised upon protecting an important public interest.

As required in other settings by this Court, categorical exceptions must be limited in scope to the narrow purposes for which they are permitted. See, e.g., Dunaway v. New York, 442 U.S. 200, 219 (1979). For example, in the context of border patrol stops, the officer may briefly question the driver and passengers about their citizenship, immigration status, and any suspicious circumstances, but "any further detention or

by William Buss in "The Fourth Amendment and Searches of Students in Public Schools," 59 Iowa L. Rev. 739, 770 (1974), an article critical of lower courts' departure from the probable cause requirement in school searches, the public interest concern, although a valid one, "is the beginning, not the end, of analysis."

search must be based on consent or probable cause." United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1976); accord, United States v. Martinez-Fuerte, 428 U.S. 543, 567 (1976). Pursuant to the categorical exception for investigative stops on less than probable cause created by Terry v. Ohio, 392 U.S. 1 (1968), a pat-down for weapons is permitted for the purpose of officer safety, but only when the police have "reasonable grounds to believe" that the person stopped is armed and dangerous. See, e.g., Pennsylvania v. Mimms, 434 U.S. 106 (1977). A search or seizure for other purposes must be based on probable cause.

In the public schools generally, there may be, as petitioner and its amici urge, a strong public interest in protecting students from weapons, drugs and other contraband. But no such interest is at stake in this case. Here, the assistant principal engaged

in a search to ascertain whether a student had lied to him in response to a teacher's charge that she had violated a school rule against smoking cigarettes in an unauthorized area. Moreover, neither the possession of cigarettes (the object of the search) nor the smoking of them in designated areas was itself a violation of school rules. Accordingly this case does not properly concern the adoption or application of a possible categorical exception to the probable cause requirement for searches designed to combat serious threats to school safety or security. Adoption of the unlimited categorical exception urged by petitioner and its amici would result in the sanctioning of searches of unprecedented scope merely because they occur in a school setting, not because of a need to respond to a unique danger.

**B. PETITIONER HAS NOT SHOWN
THAT THE RELEVANT PUBLIC
INTEREST WOULD NOT BE
SERVED UNDER THE TRADI-
TIONAL PROBABLE CAUSE
STANDARD**

In Camara the Court upheld the reasonableness of administrative searches under a relaxed standard of probable cause in part because the traditional probable cause test (probable cause to believe that a particular dwelling contains violations of the minimum standards presented by the code being enforced) would not permit an acceptable level of administrative protection:

The public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. Many such conditions -- faulty wiring is an obvious example -- are not observable from outside the building and indeed may not be apparent to the inexperienced occupant himself.

387 U.S. at 537. Here, however, not only do searches of students fit well within the

traditional probable cause model, but an additional public interest strongly counsels against permitting routine searches, such as the one at issue here, on less than probable cause.

1. Petitioner has not shown that "acceptable results" could not be accomplished if the traditional probable cause test were followed. In fact, much more so than citizens on the street, students in school are subject to almost constant monitoring since "teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school." Ambach v. Norwick, 441 U.S. 68, 78-79 (1979). Accordingly, as pointed out in LaFave, Search and Seizure, § 10.11 at 459-60, the fact situations reported in school search cases "strongly suggest that in most instances the evidence of wrongdoing prompt-

ing teachers or principals to conduct searches is sufficiently detailed and specific to meet the traditional probable cause test." Of those which do not, "most of them appear to involve information so vague and equivocal as to hardly justify the step of searching a student's person or locker." Id. at 460-61. Such cases, although ostensibly acknowledging the validity of Fourth Amendment protections in schools, in reality withhold all safeguards by leaving virtually unlimited discretion in the school officials. See Comment, "Students and the Fourth Amendment: 'The Torturable Class,'" 16 U. C. Davis L. Rev. 709, 724 (1983). For example, searches have been upheld on a "reasonable suspicion" standard because a student was found in a hallway rather than in an assigned class^{13/} or merely because a student

13. State v. Baccino, 282 A.2d 869 (Del. 1971) (upholding search of student's coat on this basis and on the assertion that the student was known to have expe- [cont'd. on next pg]

put his hand into his clothing upon approach of the principal.^{14/}

Although school officials need not ignore such circumstances, it does not follow that school officials should immediately search the student. LaFave, Search and Seizure, § 10.11 at 461 n.47. Unlike a police encounter with suspicious pedestrians on the street, school authorities have ample opportunity for further observation or questioning of students at school due to compulsory attendance rules. See, e.g., People v. D., 34 N.Y.2d 483, 358 N.Y.S.2d 403, 315 N.E.2d 466 (1974).

2. Apart from the public interest considerations which arguably might support a limited categorical exception not relevant

rimented with drugs in the past).

14. State v. Young, 234 Ga. 488, 216 S.E.2d 586 (1975).

here, there is a countervailing public interest consideration which militates against the allowance of any categorical exception whatsoever to the Fourth Amendment's probable cause requirement in the public school setting. This countervailing consideration is the pedagogic objective of teaching constitutional values by example, for, "[i]n the long run, respect for law is the most cherished civic virtue that schools can impart." State in the Interest of T.L.O., 463 A.2d 934, 942 (N.J. 1983).

Not only does our Nation's commitment to public education "demonstrate our recognition of the importance of education to our democratic society," but public education provides "the very foundation of good citizenship." Brown v. Board of Education, 347 U.S. 483, 493 (1954). Imparting the values of good citizenship necessarily means that, of the many functions which school officials

perform, there are "none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637 (1943).

Judicial recognition of this pedagogic objective is neither isolated or outdated. As Justice Powell recently summarized for the Court: "The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions." Ambach v. Norwick, 441 U.S. 68, 76 (1979)

(citations omitted).^{15/} In fact, as Justice Powell keenly observed, particularly important in imparting values is a school official's (particularly a teacher's) actual conduct in relation to the students: "a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher

15. In addition to quoting from Chief Justice Warren's observations in Brown v. Board of Education, 347 U.S. 483, 493 (1954), Justice Powell cited, e.g.: Keyes v. School Dist. No. 1, 413 U.S. 189 (1978) (Powell, J., concurring in part and dissenting in part); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 29-30 (1973); Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); id., at 238-239 (White, J., concurring); Abington School Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring); Adler v. Board of Education, 342 U.S. 485 (1952); McCollum v. Board of Education, 333 U.S. 203 (1948) (opinion of Frankfurter, J.); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). Ambach v. Norwick, 441 U.S. 68, 77 (1979). Justice Powell also observed that the judicial "perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists." Id. at 77 (citations omitted).

has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of democracy." Id. at 78-79 (footnotes omitted).

Since school officials "function as an example for students," id. at 80, students learn important constitutional values through the very actions of school officials. If school officials were allowed, for example, to suspend students for exercising free speech contrary to Tinker, to segregate students contrary to Brown, to suspend students without due process contrary to Goss, and to conduct routine searches of students without probable cause contrary to the Fourth Amendment, it is doubtful that such students in later life would have any sense of the constitutional values of freedom of expression, of racial equality, of fairness, and of per-

sonal privacy from unreasonable searches. Yet these guaranteed rights are among the very foundations of our democracy.

**C. THE PERSONAL NATURE OF
THE SEARCH CONDUCTED BY
THE ASSISTANT PRINCIPAL
ENTAILED AN INVASION OF
PRIVACY AS INTRUSIVE AS A
POLICE SEARCH FOR EVIDENCE OF A CRIME**

Contrary to petitioner's argument, lesser Fourth Amendment protections do not apply merely because the assistant principal was not a police officer or because he did not suspect T.L.O. of criminal behavior. Rather, full protection is required in view of the personal nature of the search.^{16/}

16. The Solicitor General maintains, in his Brief for the United States at 13, that "[t]he standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures," quoting South Dakota v. Opperman, 428 U.S. 364, 370 n.5 (1976). As Justice Powell pointed out in his concurring opinion, however, the probable cause requirement has also been applied outside the context of a criminal investigation, as exemplified by Camara. Justice Powell also distinguished the police automobile inventory search at issue in Opperman from the administrative search at issue in Camara. [cont'd. on next pg]

1. This Court emphasized in Camara that the overriding purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." 387 U.S. at 528. The Court thus rejected the reasoning of Frank v. Maryland, 359 U.S. 360 (1959), in which Justice Frankfurter viewed the right of privacy affected by administrative searches as "peripheral" compared to the central interest of "self protection" involved in criminal investigations. Under

tive building code search in Camara based on the amount of discretion left to officials. In contrast to building code inspections, where the practical effect of the warrantless search procedures had been to leave the occupant subject to the discretion of the official in the field, no significant discretion is placed in the hands of the individual officers conducting automobile inventories. They "usually ha[d] no choice as to the subject of the search or its scope." Id. at 384. In the context of school searches, school officials constantly make discretionary determinations whether or not to conduct searches. Unlike Opperman, this case raises concerns similar to those addressed by the Court in Camara.

Frank, the reach of constitutional protections depended on whether the search was part of a criminal investigation which might lead to prosecution. See also Abel v. United States, 362 U.S. 217 (1960) (per Frankfurter, J.). In Camara, 387 U.S. at 530, the Court explicitly rejected the Frank analysis, pointing out that it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."

Even if such a distinction were valid, however, it would not justify lesser Fourth Amendment protection in cases where, as here, the fruits of searches by school officials lead to criminal prosecutions. Cf. Wyman v. James, 400 U.S. 309 (1971) (Camara and See distinguished on this ground). Many states require school officials to report evidence of student criminal violations to the police,

and the states may prosecute school officials for failure to comply with reporting or enforcement requirements. See supra note 9. Even where intimate cooperation between police and school officials is not statutorily required, it is virtually impossible to separate police and school roles in public school searches because of the actual and potential cooperative relationship between police and school officials, and because of the lack of any bright line between the school officials' desire to help the police and to protect the safety of the school environment. The danger to Fourth Amendment rights posed by a two-tiered "silver platter" standard tied to the "uniform" of the searchers invites subversion of both our system of public education and our criminal justice system^{17/}

17. As discussed by William Buss in "The Fourth Amendment and Searches of Students in Public Schools," 59 Iowa L. Rev. at 788:
[cont'd. on next pg]

Finally, while the use to which particular evidence is put is not -- and should not be -- conclusive in assessing Fourth Amendment protection, it may be relevant in determining the constitutional reasonableness of a search. In fact, the quantum of Fourth Amendment protection available in a given setting should be a function of at least two variables: the degree to which the intrusion affects personal privacy; and the use to which the evidence is put. Where, as here, a

So long as school officials are permitted broad authority to make searches, and then to turn over the evidence to police who themselves would have been banned by the Fourth Amendment from making the search, there is a substantial likelihood that arrangements will be (and evidence that they have been) worked out so as to make such turnovers possible. The temptation to circumvent the usual Fourth Amendment restrictions by such school-police arrangement presents a serious danger of subverting both the educational and criminal justice systems.

significant intrusion into personal privacy is coupled with the use of the fruits of a search in a criminal proceeding, the case for full Fourth Amendment protection is at its highest point.

2. In any event, the primary inquiry in the third aspect of the Camara balancing test thus rests not in merely labeling the role or intent of the official searcher, but in assessing the privacy interests at issue and in comparing the intrusiveness of the search with a police search for evidence of a crime. As to this inquiry, there should be no question that a student in school has a substantial, if not extraordinary, expectation of privacy in the contents of the purse she carries on her person, and that an invasion of that privacy by a school official is every bit as intrusive as an invasion in a police search.

A purse, the functional equivalent of a pocket, typically contains items of highly personal nature. Especially for shy or sensitive adolescents, it could prove extremely embarrassing as well as injurious to personal integrity for a teacher or principal to rummage through its contents -- which could include notes from friends, fragments of love poems, caricatures of school authorities, as well as items of personal hygiene. Astonishingly, petitioner argues that T.L.O.'s purse, "voluntarily and unnecessarily brought into school, may be deemed to be an item in which any privacy interest was so minimal, that as to it, the Fourth Amendment is inapplicable." Even if it were true that all the personal items carried in a purse or pocket are "unnecessary," adoption of petitioner's view would strip students of any privacy interest in their personal "papers and effects," precisely those precious ex-

pressions of individuality that the Constitution so resolutely protects from undue state interference.

Invasion of this privacy may be even more intrusive when the search is conducted by a school official, who has frequent contacts with the students, than when the invasion is conducted by a police officer, who has no such regular student contact. Apart from these different levels of intrusiveness vis-a-vis students' intimate privacy, the assistant principal here conducted the search purportedly to obtain evidence of an infraction, just as a police officer would initiate a search to obtain evidence of wrongdoing.

The school setting context here, in fact, provides enormous potential for abuse of official discretion. In New Jersey, public school students must submit to the authority of school officials, and, under state law, the students must obey. See,

e.g., N.J.S.A. 18A:37-1. Furthermore, the consequences of even an innocent, isolated or minor violation of school rules may lead to suspension, disqualification from athletics or other school activities, or expulsion (or, even as in this case, a criminal proceeding). These are frightening, even devastating, consequences for most high school students, with high stake effects on their future development. See, e.g., Goss v. Lopez, 419 U.S. 565, 575 (1975) (one-third of randomly selected "colleges specifically inquire of the high school of every applicant for admission whether the applicant has ever been suspended").

CONCLUSION

Whatever one's view as to the "reasonable suspicion" standard applied below, the judgment below is correct because evidence used as part of the case-in-chief in a crimi-

nal prosecution must be obtained in compliance with standards substantially more stringent than the search at issue here. Evidence seized pursuant to a search that cannot satisfy even a minimal standard of objectively "reasonable suspicion" cannot, consistent with the Fourth Amendment, be the basis of a criminal prosecution.

We submit that the more stringent probable cause standard must govern the acquisition of evidence by public school officials which is used in criminal proceedings. While the government may conduct certain carefully defined categories of searches on less than probable cause under circumstances not present here, the standards governing criminal investigations must govern the admissibility of the evidence where the state seeks to convict a student of a criminal offense.

For the foregoing reasons, the judgment of the Supreme Court of New Jersey should be affirmed.

Dated: August 29, 1984

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

O

STATE OF NEW JERSEY

Petitioner,

v.

T.L.O., a Juvenile

Respondent.

O

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF NEW JERSEY

O

BRIEF OF AMICUS CURIAE IN
SUPPORT OF RESPONDENT

O

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NO. 83-712

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

STATE OF NEW JERSEY

Petitioner,

v.

T.L.O., a Juvenile

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF NEW JERSEY

BRIEF OF AMICUS CURIAE IN
SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Los Angeles County Public Defender's Office is the largest such office in the United States. This Office represents minors alleged to be juvenile delinquents because of the commission of acts which would be criminal offenses if committed by adults. Therefore, the ultimate issue in this case, i.e., the standard for admissibility of evidence seized in searches by public school officials, is of great importance to this Office.

Additionally, we are currently counsel for appellant in In re William G., Crim. No. 22945, which is currently pending before the California Supreme Court. That case involves the same issue as the case at bench, and this court's resolution of the issue herein presented may prove critical in that matter.

During the briefing of In re William G., amicus developed the approach proposed in this brief, an approach endorsed by the American Bar Association, which has not been raised by any party or other amicus. Amicus feels that the approach proposed herein has substantial merit, and reconciles the many conflicting legal theories and interests, and is worthy of this Court's consideration.

INTRODUCTION

"The guilty are almost always the first to suffer those hardships which are afterwards used as precedents against the innocent."

This sentiment, penned by then Judge John Paul Stevens in his dissenting opinion in United States v. Barrett 505 F.2d 1091, 1114-1115, (7th Cir. 1975), remains as major a concern today as it was then and is the primary reason that this Court should rule that public school

students are protected by the search and seizure provisions of the Fourth Amendment while on school campuses. It is temptingly simplistic to say that restricting the Fourth Amendment protections afforded public school students will curb violence and drug abuse in public schools; indeed, elimination of the Fourth Amendment protections of all citizens might lower overall crime rates. However, experience has shown that the government must be restricted in its power to invade the privacy interests of its citizens to avoid unjustified intrusions on the innocent as well as the guilty.

An examination of the civil cases dealing with public school searches leads to the inescapable conclusion that abuses by public schools are already wide-spread.

For example, Bilbrey v. Brown ____ F.2d

___ (Case No. 81-3008) (9th Cir. 1984), a fifth grade student was subjected to a strip search after a school bus driver, with what the court found to be little justification, thought that student and another were exchanging marijuana -- the record indicated that they were exchanging bubble gum. In the pending case of Estell v. Ford (Case No. 84-6033, W.D. Ark.), it is alleged that a school district has adopted a policy requiring a high school student to submit to either a blood, urine, breath or lie detector test at the command of any school official. A student's refusal to submit to such a test leads to the same consequence -- either suspension or expulsion from school --as a finding that the student has violated the drug or alcohol policy of the school.

In Doe v. Renfrow, 475 F.Supp. 1012

(N.D. Ind. 1979), aff'd in part 631 F.2d 91, Rehrgr. denied 635 F.2d 582, cert. denied 451 U.S. 1022, an entire student body was subjected to being sniffed by police dogs trained to detect illicit drugs. Following this general examination of the 2,780 students at the school, several were taken out of class and subjected to nude strip searches. Of the 50 who were subjected to such searches, only 15 were found to possess contraband. Diane Doe, was apparently subjected to a strip search after a dog mistakenly reacted to her because she had been playing with a family pet which was in heat.

While the abuses shown by these cases, and many more demonstrate the need for application of the Fourth Amendment's protections to school searches, the case at bench raises the further issue of what

standards are to be applied in ruling on the admissibility of evidence seized by school officials. As will be demonstrated, while it may be reasonable that Fourth Amendment standards be relaxed somewhat to allow schools to search for the purposes of internal discipline and order, there is no legal reason for such relaxed standards to be applied when the fruits of such a search are offered at a criminal or quasi-criminal trial.

PROPOSED RULE

Therefore, Amicus proposes that this Court adopt a two-tiered approach to reviewing searches of students on public school campuses. On the first tier, searches conducted solely for the purposes of enforcing school rules and regulations would be legal if supported by a reasonable suspicion that the student to be searched violated a school rule or

regulation. On the second tier evidence seized in such a search would be admissible at a criminal or juvenile delinquency proceeding only if the search was supported by the same probable cause required in searches by police officers.

This proposed rule is fashioned after Standard 8.6 of the American Bar Association Juvenile Justice Standards, Standards relating to Schools and Education. The proposed rule differs from Standard 8.6 only in that it would flatly prohibit the introduction of evidence seized without probable cause whereas the A.B.A. proposal would create a presumption that the probable cause standard should apply if such evidence is proffered at a criminal trial. The presumption approach not only places unnecessary burdens on trial courts but is also inconsistent with the applicable

law related to the status of school officials. However, the basic thrust of the A.B.A. proposal, that searches which result in prosecution be treated differently than searches which result only in school discipline, is valid in that it recognizes the differences between the two types of proceedings and accommodates those competing interests. The rule proposed by amicus serves both interests as well and more easily accommodates the legal theories involved.

I

THE FOURTH AMENDMENT TO THE
UNITED STATES CONSTITUTION
PROHIBITED THE SEARCH IN THE
CASE AT BENCH

INTRODUCTION

The relationship between public schools and their students is very complex. It is clear that the schools are arms of the government in that teachers

are public employees, subject to certification and licensing restrictions imposed by the state, schools are financed by the state, and students are compelled to attend by state law. Yet, it is equally clear that school's function is to educate children, and they must be able to exercise control over them to maintain reasonable order and facilitate the education process. (See Bahr v. Jenkins, 539 F.Supp. 483 at 487 (ED.Ky. 1982).) This schizophrenic relationship between students and public schools leads, on occasion, to conflicts such as in the case at bench, in which the actions of the school transcended those of a teacher and educator and became those of a policeman. Therefore, amicus contends that the school's actions had to be supported by probable cause.

A The Fourth Amendment applies to the search in the case at bench.

As this Court recently noted in Oliver v. United States, (1984) ___ U.S. ___, [104 S.Ct. 1735], the "touchstone" of Fourth Amendment analysis is the question of whether an individual has a reasonable expectation of privacy which is invaded by the government's search. This expectation of privacy must be both subjectively held and objectively reasonable.

There can be no question but that T.L.O. subjectively believed that the contents of her purse would remain private. Petitioner does not even attempt to argue to the contrary. The issue becomes, then, whether T.L.O.'s belief in the privacy of the contents of her purse was objectively reasonable.

Petitioner appears to contend that

students surrender their constitutional expectation of privacy when they enter public school campuses and cannot reasonably believe that they have such a right. This argument is based on an analogy to this Court's decisions in United States v. Biswell (1972) 406 U.S. 311; Donovan v. Dewey (1981) 452 U.S. 594; and Colonnade Catering Corp. v. United States (1970) 397 U.S. 72. These cases are inapposite to the matter at bench. In Biswell, this Court held that an individual who voluntarily entered into business as a firearms dealer had a diminished expectation of privacy because of his involvement in a highly regulated industry with knowledge of the regulators. Similarly, in Colonnade Catering this Court ruled that an individual who is a licensed alcohol dealer has a diminished expectation of privacy because

he voluntarily enters into a regulated business. The same result was reached and reasoning employed in Donovan v. Dewey which dealt with highly regulated rock quarries.

The rule that such warrantless searches are justified by the fact that persons who enter into highly regulated industries choose to do so with the knowledge that they have a diminished expectation of privacy in their businesses is not applicable to school grounds searches. Students are compelled by law to attend school. Therefore, it cannot be said that they voluntarily enter into a situation in which they knowingly surrender their search and seizure rights. The requirements of compulsory education laws are often cited as factors distinguishing school searches from other types of searches (such as

airport or border searches) in which individuals voluntarily place themselves in a position in which they have a diminished expectation of privacy. (E.g., Jones v. Latexo Independent School District, 499 F.Supp. 223, 234 (E.D. Tex. 1980.) Certainly students cannot be deemed to have waived their search and seizure rights as a condition of exercising their rights to a free education. (Morale v. Grigel 422 F.Supp. 988, 999 (D.C.N.H., 1976), Moore v. Student Affairs Committee of Troy State University, 284 F.Supp. 725 (M.D.Ala. 1968), Smyth v. Lubbers, 398 F.Supp. 777 (W.D.Mich. 1975).)

Schools are unique in our society in that they are the only non-penal institutions which citizens are required to attend. According to petitioner, minor-students surrender their right to be

protected from unreasonable official searches and seizures leading to criminal proceedings. If this is so, schools will join jails as the only involuntary institutions in which the probable cause requirement does not exist. Even searches on military bases must be based on probable cause. (United States v. Audain (ACMR 1980) 10 M.J. 629, 630-631; United States v. Corkill (CGCMR 1976) 2 M.J. 1118, 1120; Larkin and Munster, "Military Searches and Seizures" (1976) 29 JAG Journal 1.) Thus, students on public school grounds must have some reasonable expectation of privacy.

Recent opinions from some Justices of this Court suggest that even a reasonable expectation of privacy may not protect all sorts of property against governmental search. For instance, Oliver v. United States, supra, this

Court discussed the applicability of the Fourth Amendment to open fields when the owner of those fields took action to manifest an expectation of privacy. In the portion of the majority opinion in which Justice White joined, it was noted that the Fourth Amendment's language protected only "persons, houses, papers and effects," and that "effect" would generally be interpreted to include personal property. (35 Cr.L. 3013, fn. 7.) However, this case involves a purse, exactly the type of personal effect which would be protected by the Fourth Amendment under Oliver.

B Even if respondent's status as a public school student diminishes her expectation of privacy for school discipline searches, the Fourth Amendment bars admission of evidence seized without probable cause in criminal or quasi-criminal proceedings.

Although this Court has never ruled

directly on the applicability of the Fourth Amendment to public schools, it has examined the relationship of other components of the Bill of Rights to public schools on several occasions. In West Virginia State Board of Education v. Barnette (1943) 319 U.S. 624, this Court ruled that public school students could not be compelled to recite a flag salute, based on a recognition that compulsory recitation of a flag salute was inconsistent with both the rights to freedom of speech and freedom of religious belief. This Court ruled that the state, through its public schools, was not free to interfere with constitutionally protected rights absent some evidence that interference was necessary to avoid a "clear and present danger" to the operation of the school. (319 U.S. at pp. 633-634.)

In Tinker v. Des Moines Independent Community School District (1969) 393 U.S. 503, this Court ruled that public school students could not be prohibited from wearing black arm-bands to protest the Vietnam war. In so ruling, this Court limited the school's power to infringe on students' constitutional rights to those restrictions necessary to insure safety on school grounds. Prohibiting black arm-bands was found to be an infringement on freedom of speech not supported by any need to maintain discipline and order on the campus.

The general rule that a student's constitutional protections are diminished on campus only to the degree necessary to maintain order on campus is consistent with the holdings of this Court on a minor's rights to privacy under the

Fourth Amendment. In both Planned Parenthood of Central Missouri v. Danforth (1976) 428 U.S. 52, and Carey v. Population Services International (1977) 431 U.S. 678, this Court ruled that minors are persons entitled to the privacy protections of the Fourth Amendment. This Court added a caveat that the state may restrict this privacy right in some instances due to the immaturity of children, but only when necessary to serve "a significant state interest. . . that is not present in the case of an adult." (428 U.S. 52, 75, 431 U.S. 678, 692, emphasis added.)

Admittedly, school discipline may support a diminution of minor's search and seizure rights. There is a substantial state interest in maintaining school discipline, and the consequences to the student are not terribly severe

in most cases. Certainly discipline of students is an interest which is not present in the case of an adult. However, this justification cannot support an attempt to extend it to criminal or quasi-criminal proceedings. While enforcement of criminal laws may be of substantial interest to the state, it is an interest which extends to both adults and minors. There is no distinction which would support a diminution of minor's right to privacy.

In Ingraham v. White (1979) 430 U.S. 651, this Court examined the use of corporal punishment, as a disciplinary measure, in the public schools. The attack on the use of punishment was twofold: it constituted cruel and unusual punishment, and students were denied due process when such punishment was imposed without notice or a hearing. In holding

that corporal punishment, imposed as a means of school discipline, did not constitute cruel and unusual punishment, this Court traced the history of the provisions of the Eighth Amendment, and noted that the cruel and unusual punishment restriction arose because of concerns regarding the rights and treatments of persons convicted of crime. This Court held that the cruel and unusual punishment limitation thus applied only to criminal proceedings. This Court noted exactly what amicus is urging: there is a difference between actions taken to advance the safety and discipline of the school and actions taken to begin or facilitate criminal prosecutions.

The case at bench is a quasi-criminal case, and amicus submits that the rule generally applied in such cases, i.e., that a search must be supported by

probable cause, must also be applied here. The fact that the search occurred on a public school ground cannot alter this result.

C A public school official is a governmental agent for the purposes of the Constitution's limitations on searches and seizures.

The search and seizure limitations of the Fourth Amendment to the United States Constitution apply only to searches conducted by the government or under the color of its authority. (Burdeau v. McDowell (1923) 256 U.S. 465. The governmental status of school officials has been the subject of considerable judicial debate. However, the modern trend has been to hold that public school officials are agents of the state for purposes of constitutional protections of individual rights. The "issue" of whether school officials are peace

officers is a "red herring", although some cases such as In re Guillermo M. (1972) 130 Cal.App.3d 642 have tended to draw this distinction for the purposes of search and seizure. The proper distinction to be drawn, however, is that between governmental agents and private citizens; the peace officer/private citizen distinction is too narrow and misinterprets the requirements of the constitution.

The constitutional limitations on searches and seizures do not operate only upon peace officers; they are restrictions on government as a whole. (Camara v. Municipal Court (1967) 387 U.S. 523; Marshall v. Barlow's Inc. (1978) 436 U.S. 307; G.M. Leasing Corp. v. United States (1977) 429 U.S. 338. As this Court stated in Griffin v. Maryland (1964) 378 U.S. 130;

"If an individual is possessed of State authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action he took was not authorized by state law."

Public school officials clearly operate under color of governmental authority. In New Jersey, as in other states, their authority over students is derived from statute (N.J.S.A 18A:37-1, see also State v. Lonk (1982) 180 N.J. Super. 140, 434 A.2d 602.) Students are compelled by law to attend schools where such officials have authority over them (N.J.S.A 18A:38-25), officials use their statutory title and authority to place students in custody and transport them to the offices where searches occur and the actual searches generally take place in a governmentally owned and operated

facility: the public school.

Additionally, it is clear that school officials act to protect the interests of the public, rather than a private employer. School Districts and boards are creations of statute, and principals as well as teachers are employed by those districts under the authority of statute. (N.J.S.A. 18A:6-34; 18A:16-38; 18A:4-1; 18A:4-15; 18A:4-16; 18A:4-10, 18A:4-16.) Furthermore, the funding for public schools comes from public bonds and tax money (N.J.S.A. 18A:Chapt. 22 and 24) and the certification and employment of public school teachers are controlled by statute. (N.J.S.A. 18A:26-1 et. seq.)

Citing such factors, federal courts, beginning with this Court in West Virginia State Board of Education

v. Barnette (1943) 319 U.S. 624 1/, have universally held that school officials act in a governmental capacity for purposes of personal constitutional rights, including those of the Fourth Amendment. 2/ Most state courts which

 1 In West Virginia State Board of Education v. Barnette, supra, 319 U.S. 624, this Court said:

"The Fourteenth Amendment, as now applied to the States, protects citizens against the State itself and all of its creations - Boards of Education not excepted. These have, of course, important, delicate and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights." (319 U.S. 637, emphasis added.)

2 "As courts in most recent cases have decided, we think it beyond question that the school official, employed and paid by the state and supervising children who are, for the most part, compelled to attend, is an agent of the government and is constrained by the Fourth Amendment."

(Horton v. Goose Creek Independent School District, supra, 690 F.2d 470, 480.) (See also, Picha v. Wielgos, 410 F.Supp. 1214, 1217 (1976) Jones

have considered the question have concluded that public school officials are state agents for purposes of the Fourth Amendment and, where discussed, for the purposes of applicable state constitutional protections against unreasonable searches and seizures. (See, Doe v. State (1975) 88 N.M. 347, 540 P.2d 827, 831 (1975), D.R.C. v. State, 646 P.2d 252, 255 (Alaska 1982), Interest of J.A., 85 Ill.App.3d 567, 40 Ill.Dec. 755, 406 N.E.2d 958, 962 (1980), Interest of L.L., 319 S.2d 154, 156 (Wis.App. 1975), People v. D., 34 N.Y.2d 483, 358 N.Y.S.2d 403, 405 (1974), State v. Baccino, 282 A.2d 869, 871 (Del.Super. 1971) 3/, State v. McKinnon,

v. Latexo Independent School District, 499 F.Supp. 223, 229, (E.D. Tex. 1980); Bellinier v. Lund, 438 F.Supp. 47, 50-52 (N.D. N.Y. 1977)

³ In State v. Baccino, supra, 282 A.2d 869, the court noted the numerous

88 Wash.2d 75, 558 P.2d 781, 783-784 (1977), State v. Walker, 528 P.2d 113, 115-116 (Or.App. 1974), State v. Young, 234 Ga. 488, 216 S.E.2d 586, 591 (1975).)

Although no California court has specifically so held, 4/ the clear implication of the California cases, with the exception of In re Donaldson (1969) 269 Cal.App.2d 509, 75 Cal.Rptr.220, is that California courts consider public school officials to be government agents

cases in which school officials' actions were considered state action for the purposes of civil rights actions pursuant to 42 U.S.C. 1983 and 1985 and concluded:

" . . . it is difficult to see how a principal could also be a private person for the purposes of the Fourth Amendment at the same time. (282 A.2d 871.)

⁴ This question is currently pending before the California Supreme Court in In re William G., Crim. 22945.

for the purposes of search and seizure. In In re Thomas G., 11 Cal.3d 1193, 90 Cal.Rptr.361 (1970), the California Court of Appeal discussed the conduct of a high school principal and dean in Fourth Amendment terms and found it to be "reasonable". Similarly, in In re Fred C., 26 Cal.App.3d 320, 325, 102 Cal.Rptr.682 (1972), the Court of Appeal discussed the school official's conduct in terms of constitutional "reasonableness". In In re Christopher W., 29 Cal.App.3d 777, 782, 105 Cal.Rptr.775 (1973), the Court of Appeal couched its discussion in terms of the Fourth Amendment limiting the power to search under the doctrine of in loco parentis, although it finally suggested that, "high school personnel are not government officials for the purposes of the constitutional rules regulating police

conduct", in apparent contradiction of its earlier application of the Fourth Amendment.

- 1 The doctrine of In Loco Parentis may not change public officials into private citizens for search and seizure purposes

In In re Donaldson, supra, 269 Cal.App.2d 509, the California Court of Appeal ruled that public school officials were not governmental agents for the purposes of the Fourth Amendment but were, rather, private persons to whom the constitutional search and seizure restrictions did not apply. This theory which has been adopted in only one other jurisdiction, Texas (Mercer v. State, 450 S.W.2d 715 (Tex.Civ.App. 1970)), and, as discussed above, has been implicitly rejected by subsequent California cases, was based on the following logic:

The common-law doctrine of in loco parentis is premised in

part on the notion that parents delegate their authority over children. The schools then stand in the place of the parents (in loco parentis) who are private persons.

This theory has been universally criticized by commentators, being described as "inscrutable" by one. (Buss, The Fourth Amendment and Searches in Public Schools (1974) 59 Iowa L.R. 739, 766.) The basic problem with this reasoning is that it disregards both the theory behind the doctrine of in loco parentis and the realities of modern public education, not to mention the Constitution and subsequent codifications of the doctrine.

The doctrine of has two sources, common-law and statutory. The common-law doctrine was described by Blackstone as follows:

"He [father or guardian] may also delegate part of his parental authority, during his

life, to the tutor or schoolmaster, of his child; who is then in loco parentis (in the place of a parent), and has such a portion of the power of the parent committed to his charge, viz., that of restraint and correction, as may be necessary to answer the purposes for which he is employed." (1 Blackstone's Commentaries 453.) 5/

Thus, the common-law doctrine of in loco parentis had two components: (1) delegation of authority from the parents to the school, and, (2) a limitation of authority vested in the tutor or schoolmaster to that which was necessary to facilitate the restraint and correction

⁵ At least part of this common-law concept of the doctrine of in loco parentis lives on in the Restatement of Laws, Second. Restatement of Torts 2d, § 153 differentiates between the authority delegated by a parent and a public school teacher who has a somewhat broader authority to inflict punishment or discipline as may be necessary. (Compare, Rest.2d, Torts § 153, subd. (1) and § 153, subd. (2).)

needed to accomplish the purpose of education. (Comment: Constitutional Law - Search and Seizure - School Officials' Authority to Search Students Is Augmented by the In Loco Parentis Doctrine - Nelson v. State, 319 So.2d 154 (Fla.2d Dist. Ct.App. 1975); 5 Florida State L.R. 526, 6530 (1977).)

The passage of time and the advent of compulsory education laws have undermined much of the theoretical basis for the common-law definition of the in loco parentis doctrine. In most states, the first component, delegation, cannot be said to exist as parents are mandated by law to enroll their children in school. This has led at least one court to conclude:

"...the phrase in loco parentis, used by Blackstone to described the relationship between teachers and students when education was predominately private and teachers

could reasonably be viewed as the agent of the students' parents, has little utility in describing contemporary compulsory public education." (D.R.C. v. State, supra, 646 P.2d 252, 255.)

Many states, including New Jersey, sidestep the delegation problem by granting school officials certain statutory privileges to effectuate discipline. (N.J.S.A. § 18A:6-1; see also, 24 P.a. P.S. 13-1217; Calif. Ed. Code § 44807, Fla. Stat. 1983 §§ 232.26 and 232.27:) The statutory elimination of the delegation element of the common-law definition of the in loco parentis doctrine also undermines the foundation of such cases as In re Donaldson, supra. If, as the court in Donaldson theorized, school officials become private citizens because of the delegation of the parents' private citizen status, the elimination of that delegation eliminate the

basis for private citizen status. School officials now act pursuant to statutory, rather than delegated, authority. This, combined with the other indicia of state action discussed above, clearly put school officials within the constitutional definitions of state agents for the purposes of constitutional limitations of searches and seizures.

Additionally, when the common-law doctrine of in loco parentis evolved, education was a largely individual matter without the interstudent relationships inherent in large urban schools. (See, generally, Mawdsley, In Loco Parentis: A Balancing of Interests, 111. B.J. 638 (1973).) Therefore, the disciplinary powers granted by the doctrine were for the benefit of the individual child, rather than for the protection of the whole of the student body. To stand in

the place of the parent meant to share the parents' concern for the welfare of the individual student and to exercise the power in the same way as the parent. (Comment: 5 Florida State L.R. 526, 531, see also, Rest.2d Torts § 153, subd. (1) and comment thereto.)

Therefore, the second component of the common-law concept doctrine is not present in modern public schools as they are less concerned with the individual student than with the protection of the student body as a whole. 6/

 6 This has led one commentator to note:

"Insofar as in loco parentis sums up the peculiar school-student relationship and the school's related interest in searching students, it focuses almost entirely on protection of other students and on coercive power over the searched student. One of the things which makes in loco parentis such an erroneous phrase in this context is precisely the absence of a genuinely parental protective con-

As noted above, both the statutory and common-law doctrines of in loco parentis have a second restriction, that is, the action taken by school officials is limited to that necessary to maintain a proper educational environment. Simply stated, in the case a bench, that meant the school could remove T.L.O. and her marijuana from the campus. Reference for

cern for the student who is threatened with the school's power. It is presumably a characteristic of the use of parental force against a child that the force is tempered by understanding and love based on a close, intimate and permanent child parent relationship. What so many of the courts persist in talking about as a parental relationship between school and student is really a law enforcement relationship in which the general student society is protected from the harms of anti-social conduct. As such, it should be subjected to law enforcement rules." (Buss, The Fourth Amendment and Searches of Students in Public Schools (1974) 59 Iowa L.R. 739, 768.)

criminal prosecution was not necessary to accomplish that goal. Under N.J.S.A. 18A:37-4 and 18A:37-5 the principal of a public school may summarily suspend a student immediately upon apprehension if that student is in possession of a controlled substance and the principal determines that such action is necessary for the safety of the school. Therefore, the function suggested by the in loco parentis doctrine would have been well served by the use of the disciplinary power provided by statute and prosecution was not necessary.

The absurdity of employing the doctrine of in loco parentis in the case of searches by public school officials is underscored by the obvious conflict between the "parent" function under the doctrine and the law enforcement function

of school officials. It would be unrealistic to expect that governmental agents employed as officials in a public school would exercise the same circumspection in notifying the police as a student's parent would. state appointed "parent" cannot dispassionately waive a student's privacy right when that very official is doing the searching.

These theoretical problems have led some courts to reject in loco parentis as a basis for searches conducted only for the purposes of school discipline. (E.g., Horton v. Goose Creek Independent School District, supra, 690 F.2d 470, 480-481, fn. 18.) These difficulties have led other courts to differentiate between searches conducted for the purpose of school discipline and searches which lead to evidence offered in criminal proceedings.

It has been often noted that the doctrine of in loco parentis does not confer powers which are coextensive with those of parents and cannot be allowed to transcend students' constitutional rights. (E.g., Picha v. Wielgos, supra, 410 F.Supp. 1214 1218-1219, Axtell v. La Penna 323 F.Supp. 1077, 1079-1080 (W.D. Pa. 1971).) It is clear that the doctrine serves as no impediment to declaring public school officials to be governmental agents for the purposes of constitutional limitations. Because of all of the indicia which indicate the public school officials act under the color of state law and for a state purpose, they should be declared governmental agents and held responsible for the search and seizure limitations.

II

PROBABLE CAUSE IS THE APPROPRIATE STANDARD FOR ADMISSIBILITY OF EVIDENCE IN JUVENILE COURT PROCEEDINGS

Many courts have recognized that school officials are government agents and subject to the constitutional limitations on searches and seizures, but have allowed school ground searches on a "reasonable suspicion", rather than the probable cause required in searches by police officers. (E.g., Doe v. State, supra, 88 N.M. 347, 540 P.2d 827, 832, State v. Baccino, supra, 282 A.2d 869, 871.) This lesser standard is imposed because of an application of the doctrine of in loco parentis, and the courts' feeling that balancing this doctrine and the responsibilities attendant to it against the privacy rights of minors justifies a lower standard.

(State v. Baccino, p. 871.) This might be a legitimate concern when the fruits of the search are used solely for school discipline, but the justification disappears when the fruits of such a search form the basis of a criminal or quasi-criminal prosecution, such as that in the case at bench.

At the outset, it cannot be denied that there is a substantial difference between school disciplinary proceedings and juvenile delinquency proceedings, which are quasi-criminal in nature. The most fundamental difference is the nature of the interest involved. While the right to a free education is not to be minimized, San Antonio School District v. Rodriguez (1973) 411 U.S. 1, 18, 33-39, it has never been accorded the same importance as liberty, the subject of criminal and delinquency proceedings and

an interest which has been described as second only to life itself.

One need look no further than the required procedural protections to perceive the judicial recognition of the distinctions between school disciplinary proceedings and quasi-criminal delinquency proceedings. In In re Gault (1967) 387 U.S. 1, this Court mandated the right to counsel, the right to notice and an opportunity to prepare, the right to present a defense and the right to confront and cross-examine witnesses all be a part of the juvenile court process. In In re Winship (1970) 397 U.S. 358, this Court ruled that the Constitution required that the reasonable doubt standard used in criminal cases be applied to juvenile delinquency proceedings because:

" . . . civil labels and good intentions do not themselves

obviate the need for criminal due process safeguards in juvenile courts, for '[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.'" (397 U.S. 366-367.)

In contrast, in Goss v. Lopez, 419 U.S. 565, 579-585, 42 L.Ed.2d 751, 95 S.Ct. 729 (1979), this Court held that there is no necessity for preparation time, counsel, the right to call witnesses and the right to confront and cross-examine witnesses in minor disciplinary proceedings. In its opinion in John A. v. San Bernardino City Unified School District, 33 Cal.3d 301, 187 Cal.Rptr. 472, 654 P.2d 242 (1982), the California Supreme Court held that the evidentiary standard in expulsion hearings is a preponderance of the evidence (33 Cal.3d 307), restricted the scope of the right

to confront and cross-examine witnesses and held, implicitly, that there is no right to counsel. Clearly, these distinctions in the procedural protections reflect a recognition of the differences in the consequences involved in delinquency and disciplinary proceedings. Indeed, the distinction is so great that at least one court has indicated that there may be state action, bringing the Fourth Amendment into play, only in delinquency proceedings. (In Interest of L.L., 280 N.W.2d 343, 348, supra.)

The courts have generally allowed schools to handle discipline internally while delinquency is handled in the courts. Because school disciplinary proceedings are purely school affairs, with relatively minimal collateral consequences, it is appropriate to use the doctrine of in loco parentis, at least

as it is defined by statute, to allow schools to maintain order. However, there is no theoretical or practical reason for allowing the introduction of evidence seized in a search done on less than probable cause, pursuant to the doctrine of in loco parentis, in a criminal case. The school's actions in this matter exceeded the bounds set by the doctrine the second it contacted the police and started the mechanism of prosecution in action.

A number of courts have suggested that public school officials be allowed to search on less than probable cause for the purposes of school discipline, but that probable cause be required if the material seized was offered at a criminal trial. (Doe v. Renfrow, 475 F.Supp. 1012, (N.D. Ill. 1979) affd. 631 F.2d 91 (7th Cir. 1980), cert.den. 451

U.S. 1022 [69 L.Ed.2d 395, 101 S.Ct. 3015], Bahr v. Jenkins, 539 F.Supp. 483, 485-486, 488, supra, Jones v. Latexo Independent School District, 690 F.2d 470, 481 fn. 19, supra, Stern v. New Haven Community Schools, 529 F.Supp. 31, 35-36, supra, see also, Comment, Search and Seizure in Public Schools: Are Our Children's Rights going to the Dogs?, 24 St. Louis L.J. 119, 129-130 (1979).)

This approach has also been adopted by the American Bar Association in its Juvenile Justice Standards, Standards Relating to Schools and Education. The American Bar Association Standard on this topic, Standard 8.6 focuses on the intent of the school at the time of the search. Recognizing that this would be the subject of considerable controversy and litigation, the standard creates a presumption that the school official had

the necessary intent if the evidence is offered at the criminal trial, noting that close cooperation with the police is a common occurrence. (Comment to Standard 8.6.)

Although the standard is conceptually valid in that it provides for flexibility in searches by the school officials, the presumption it creates is unnecessary. Any time evidence seized pursuant to a search conducted without probable cause is introduced at a criminal trial, the doctrine of in loco parentis will have been violated. A better rule would be to flatly prohibit the introduction of such evidence at criminal trials. Applying that rule to the case at bench, in order to avoid suppression of evidence at T.L.O.'s trial, the principal would have had to have had probable cause to search her

purse, since the contents were given to the police and juvenile court proceeding were instituted.

III

THE EXCLUSIONARY RULE APPLIES TO ILLEGAL SEARCHES CONDUCTED BY PUBLIC SCHOOL OFFICIALS

Amicus is aware that the two-tiered approached urged herein includes a limited exclusionary rule invoked on different standards depending on the type of proceeding at which the fruits of the search is proffered. There is, however, ample precedent for limited application of the exclusionary rule. (I.N.S. v. Lopez-Mendoza, (1984) ___ U.S. ___, 104 S.Ct. 3479, United States v. Calandra (1974))

A minority of jurisdictions have ruled that public school officials are subject to the Fourth Amendment but that application of the exclusionary rule is

the proper because school officials are not law enforcement officers. (State v. Young, 216 S.E.2d 586, supra, D.R.C. v. State, 646 P.2d 252, supra.) However, as this Court pointed out in Michigan v. Tyler (1978) 436 U.S. 499 there is no requirement that law enforcement be the primary function of a governmental agency in order for exclusionary rule to apply to its searches.

Past decisions of this Court and others contain many examples of non-law enforcement governmental agencies to which the Fourth Amendment and the exclusionary rule apply: fire departments seeking code violations (Camera v. Municipal Court, 387 U.S. 523, supra, See v. City of Seattle, 387 U.S. 541, supra)), county welfare workers searching for evidence of eligibility (Parrish v. Civil Service Commission, 66 Cal.2d

260, 57 Cal.Rptr. 623, 425 P.2d 223 (1967), searches for pests by state agricultural inspectors (Vidaurri v. Superior Court, 13 Cal.App.3d 550, 91 Cal.Rptr. 704, (1970) searches of first class mail by a postman (People v. Superior Court (Flynn), 275 Cal.App.2d 489, 79 Cal.Rptr.904 (1969)), inspectors for the Occupational Health and Safety Administration (Marshall v. Barlow's Inc. (1978) 436 U.S. 307, Salwasser Manufacturing Co. v. Municipal Court, 94 Cal.App.3d 223, 156 Cal.Rptr.292 (1979)) and I.R.S. agents conducting a tax levy (G.M. Leasing Corporation v. United States, 429 U.S. 338. Thus, it is clear that the exclusionary rule applies to any agency of the government conducting a search resulting in criminal prosecution.

The application of the exclusionary

rule is based on two considerations: deterrence of constitutional violations and the avoidance of judicial participation in illegal conduct by other government bodies. (United States v. Calandra (1974) 414 U.S. 338. The traditional test for the application of the exclusionary rule is whether the party involved would be deterred from committing unlawful searches and seizures by application of the rule.

Alternatives to the exclusionary rule are one factor to be considered. Generally, there are two federal remedies which are employed in cases involving unlawful searches and seizures: civil rights actions pursuant to 42 U.S.C. 1983 and actions for damages under the Fourth Amendment pursuant to the authority of Bivens v. Six Unknown Federal Narcotics Agents (1971) 403 U.S. 388.

Although these actions rest on different bases they are treated similarly by the courts, except that a Bivens type action is limited to federal officials. (Rodriguez v. Ritchey, 539 F.2d 394 (5th Cir. 1976); Brubaker v. King, 505 F.2d 534 (7th Cir. 1974).) Good faith is a complete defense to both types of actions and the plaintiff must prove malicious intent, rather than a mere lack of probable cause, to prevail on either. These restrictions have been applied to 42 U.S.C. 1983 actions against school officials. (Wood v. Strickland (1975) 420 U.S. 308. The court in Morale v. Grigel, supra, 422 F.Supp. 988 examined these restrictions and concluded:

" . . . the Supreme Court has left students basically remediless in the Federal Courts for violations of their Fourth Amendment rights." (422 F.Supp.

1001.)

In Jones v. Latexo Independent School District, 499 F.Supp. 223, supra, the court cited the lack of any effective federal civil remedy as the basis for imposing the exclusionary rule in disciplinary cases.

The limitations which this restriction places on a civil remedy to unlawful searches on school grounds is vividly demonstrated by two of the cases which have applied it in that context. In both Doe v. Renfrow, supra, and Bilbrey v. Brown, supra both plaintiffs were initially denied relief on the grounds that the school officials, who had been found to have acted illegally, were immune under the rule of Wood v. Strickland. In the Court of Appeal, both students were granted relief, but only to the extent that they were damaged by

the nude strip searches to which they were ultimately subjected. Thus, one could be left with the impression that civil remedies may deter strip searches only. Certainly, the privacy protection of the Fourth Amendment is not limited to a mere prohibition on strip searches.

While there have been cases which have declined to apply the exclusionary rule to school personnel (e.g., D.R.C. v. State, 646 P.2d 252, supra), no case has ever suggested that public school personnel would not be deterred by application of the exclusionary rule. In fact, the cases which have addressed the issue have uniformly found that the goals of the exclusionary rule are served by application of the exclusionary rule. In referring to the employment of the exclusionary rule in state college disciplinary/expulsion proceed-

ings, the court in Smyth v. Lubbers, 398 F.Supp. 777 (W.D. Mich. 1975) noted:

"If there were no exclusionary rule. . . , the . . . authorities would have no incentive to respect the privacy of its students. . . . Where, as here, the authorities who violated the Constitution were not demonstrably guilty of bad faith, the exclusionary rule remains the only possible deterrent, the only way to positively encourage respect for the constitutional guarantee." (398 F.Supp. 794.)

This same rule, for the same reasons, has been applied to searches at public high schools. (Caldwell v. Cannady, 340 F.Supp. 835, 839-840 (1972); Jones v. Latexo Independent School District, 499 F.Supp. 223, 238-239 supra.)

The simple fact is that the law should discourage illegal invasions of students' privacy rights by public school officials acting under color of state law. As noted above, civil remedies have

been limited to the point that they appear to extend to only the most egregious conduct and, experience has shown, as demonstrated in the reported cases, such civil remedies do not act as a deterrent to unlawful invasions of students' privacy. Neither petitioner nor the amici in support of petitioner's position seem to dispute this. Petitioner also fails to suggest an appropriate remedy for violation of students' privacy rights.

It cannot be seriously argued that public school officials will be unaware of the application of the exclusionary rule to school searches. It appears that most school districts maintain a search and seizure policy (see Knowles, Crime Investigation in the School: Its Constitutional Dimensions (1964) 4 Journal of Family Law 151) and constitutional

limitations on searches and seizures are the subjects of articles in professional journals. (See Comment: The Fourth Amendment and High School Students, 6 Willamette Law Review 567 (1970).

The second rationale for the imposition of the exclusionary rule, judicial integrity, is both important and relevant in this context. The school search situation is not the typical "private person" search in that it involves concerted action by one unit of the government, the schools, aiding another, the police. In this respect it is similar to the "silver platter doctrine" cases in which this Court ruled that governmental officials who violate a citizen's rights may not escape the operation of the exclusionary rule by merely presenting illegally seized evidence to governmental officials in another jurisdiction.

(Elkins v. United States, 364 U.S. 206, 4 L.Ed. 2d 1669, 80 S.Ct. 1437 (1960); Silverthorn Lumber Co. v. United States, 251 U.S. 385, 64 L.Ed. 319, 40 S.Ct. 182 (1920), see also, Note: Search and Seizure in the Public Schools, 36 Louisiana State L.R. 1067, 1071 (1976).)

It would be contrary to both the language and policy of the constitutional limitations on searches and seizures to allow public school officials, clearly governmental agents, to seize evidence in a manner which would be illegal for the police and then present it to the police and have it admissible in court.

CONCLUSION

As often happens in matters involving major constitutional questions, the case in the matter at bench has been consumed by the issue. The true issue in this case is not whether public

school officials may legally search students on less than probable cause to effect intramural discipline nor is it whether the state, through its public schools, maintains a property interest in desks and lockers sufficient to allow searches of those objects. Rather, the question presented by the facts of this case is whether public school students surrender their constitutional protections against being prosecuted for criminal offenses based on evidence seized in warrantless searches of their persons based on less than probable cause merely because they comply with their legal responsibility to attend school. T.L.O. is before this Court because a New Jersey court found that she committed a criminal violation making her a juvenile delinquent. Therefore, the focus of discussion is the standard to be applied

to criminal or quasi-criminal delinquency proceedings.

Yet, the underlying question posed by this case transcends any rule which this Court may fashion for the admissibility of evidence in criminal or quasi-criminal cases. This Court is truly deciding an issue which will determine the nature of our public schools for years to come. Are schools to become areas where the rights guaranteed by the Constitution are suspended or are they an extension of our society wherein student-citizens are treated with dignity and respect? What are the lessons to be taught in public school; are our citizens to be taught that that the values which have led our nation to unparalleled greatness in its two-hundred year history can be denied to the few who are unrepresented and,

essentially, voiceless in deciding on national leadership? Have we, as a nation, learned nothing from the damage caused by past efforts to deny the protections of the constitutional to members of our society? (See, E.g., Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944).)

Ironically, New Jersey, like many states, requires that public school students be instructed in the content and meaning of the United States Constitution as part of their school curriculum. (N.J.S.A. 18A:6-3. See also Cal.Ed. Code § 44806.) Yet the State of New Jersey is now arguing to this Court that a rule should be fashioned denying those very students one of the most cherished of personal rights --the right to be free from governmental invasion of personal privacy. This is a classic

example of sending the message to public school students that they should believe as the government says and ignore what it does. As Justice Brennan so eloquently stated in his dissent from the denial of certiorari in Doe v. Renfro, 451 U.S. 1022, 101 S.Ct. 3015, 69 L.Ed.2d 395 (1981):

"We do not know what class petitioner was attending when the [search occurred], but the lesson the school authorities taught her that day will undoubtedly make a greater impression than the one her teacher had hoped to convey. I would grant certiorari to teach petitioner another lesson: that the Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,' and that before police and local officers are permitted to conduct dog-assisted dragnet inspections of public school students, they must obtain a warrant based on sufficient particularized evidence to establish probable cause to believe a crime has been or is

being committed. Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms."

This Court must actually address two issues in this case: the definition of the Fourth Amendment privacy rights of public school students as a whole and the formulation of rules regarding the admissibility of evidence seized by governmental officials employed by public school districts in criminal or quasi-criminal cases which are instituted distinct from school discipline proceedings. Amicus urges this Court to rule that the protections of the Fourth Amendment apply to school campuses and to adopt flexible standard which will allow school officials to take disciplinary action against

students on evidence seized with a "reasonable suspicion" of wrong doing yet that will also recognize that criminal or quasi-criminal proceedings involve a greater interest and therefore may be pursued only if the proffered evidence was seized with probable cause.

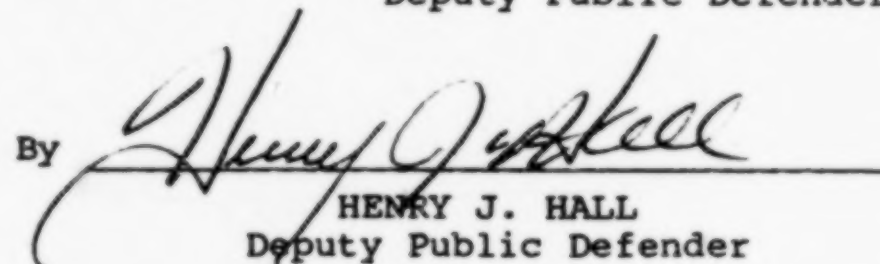
Respectfully submitted,

WILBUR F. LITTLEFIELD, PUBLIC DEFENDER
of Los Angeles County, California

Laurence M. Sarnoff,
Henry J. Hall,

Deputy Public Defenders

By

A handwritten signature in dark ink, appearing to read "Henry J. Hall", is written over a horizontal line. The signature is fluid and cursive.

HENRY J. HALL
Deputy Public Defender

Attorneys for Amicus Curiae

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

_____o_____

STATE OF NEW JERSEY

Petitioner,

v.

T.L.O., a Juvenile

Respondent.

_____o_____

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF NEW JERSEY

_____o_____

MOTION FOR LEAVE TO FILE BRIEF
AS AMICUS CURIAE AND REQUEST
FOR RELIEF FROM LATE FILING

_____o_____

WILBUR F. LITTLEFIELD, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

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NO. 83-712

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_____^o_____

The undersigned Los Angeles County Public Defender's Office respectfully requests leave of this Court to file a brief as amicus curiae on behalf of respondent in the above-entitled case. Consent to this has been obtained from respondent; petitioner has not directly responded to the request for consent.^{1/}

The undersigned counsel requests leave to file the amicus curiae brief in this case because he has a position to advance to this Court which has not been advanced by the parties or other amici. The undersigned feels that the flexible approach to the application of the Fourth Amendment to school searches which he

1 The undersigned has made numerous telephone calls to counsel for petitioner and has sent a letter explaining his interest in the matter and a form for counsel for petitioner to complete granting consent. Neither the telephone calls nor the form have been returned. One of counsel's for petitioner subordinates informally told the undersigned that any consent would have to come from petitioner's counsel directly and that he had not theretofore given consent to any other potential amici. That subordinate did not know how petitioner's counsel would feel about the instant request.

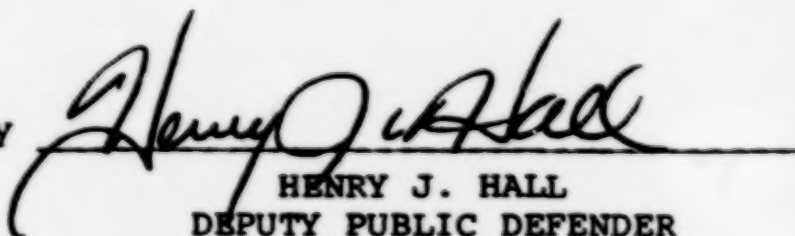
advocates, and which has been adopted by the American Bar Association, is a concept which more adequately accommodates the competing interests involved in school searches than the approaches advanced by the parties and other amici and is worthy of this Court's consideration. The interest of the undersigned in the issue of this case is set forth in the brief itself.

The undersigned also respectfully requests leave of this Court to file this motion late; the briefs themselves were submitted in a timely manner. When the briefs were submitted to this Court, the undersigned was still hopeful that consent would be obtained from petitioner. While the undersigned has still not been told that consent would not be forthcoming, petitioner's counsel's failure to respond to numerous telephone calls and a letter demonstrates that consent is unlikely. This motion would have been filed with the brief had petitioner's position been clear at the time. However, the undersigned, in recognition of this Court's preference for consent and out of consideration for petitioner's

counsel, hoped that consent would be forthcoming. 2/ That hope was apparently in vain and the undersigned now requests that this court allow the filing of the brief in this case, recognizing the efforts made to obtain consent and the fact that petitioner's counsel apparently will not communicate with him.

Respectfully submitted,

WILBUR F. LITTLEFIELD, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

By 
HENRY J. HALL
DEPUTY PUBLIC DEFENDER

Attorneys for Amicus Curiae
in Support of Respondent

2 The experience of this Office has
been that parties never refuse consent.